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No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

TIDEWATER MARINE SERVICE, INC.
and WESTERN BOAT OPERATORS, INC.,
Petitioners,

vs.

LLOYD W. AUBRY, JR., STATE OF CALIFORNIA LABOR COMMISSIONER, AND DIVISION OF LABOR STANDARDS ENFORCEMENT, STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents, labor law enforcement officials for the State of California, have attempted to regulate the maximum working hours of seamen serving on petitioners' United States documented vessels operating on the high seas and within state territorial waters off the coast of California. Respondents have based their authority on a general state regulation which addresses the maximum hours of work for land-based employees. The questions for review are:

1. Are respondents' actions preempted by the express exemption of seamen from land-based maximum hour standards, as set forth in Section 13(b)(6) of the Fair Labor Standards Act, interpretive regulations adopted by the Department of Labor, and decisions by the Courts of Appeals?

2. Are respondents' actions preempted by the constitutional requirement of uniformity of federal admiralty law, as set forth in this Court's decisions in cases such as *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917), *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920), and similar decisions by the Courts of Appeals?

3. Under this Court's decisions in cases such as *Oil Workers v. Mobil Oil Corp.,* 426 U.S. 407 (1976), and *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207 (1986), may respondents regulate the maximum hours of work for seamen whose predominant worksite is on the high seas beyond state territorial waters?

LIST OF PARTIES

The parties in the trial and appellate proceedings below were Tidewater Marine Service, Inc., and Western Boat Operators, Inc. (appellees and plaintiff-intervenors); Lloyd W. Aubry, Jr., Labor Commissioner of the State of California, and Division of Labor Standards Enforcement, Department of Industrial Relations of the State of California (appellants and defendants); and Pacific Merchant Shipping Association, American Institute of Merchant Shipping, Offshore Marine Service Association, Western Oil & Gas Association, and Clean Seas Association (appellees and plaintiffs).

Petitioners in this Court are Tidewater Marine Service, Inc., and Western Boat Operators, Inc. (collectively referred to as "Tidewater"). Respondents are Lloyd W. Aubry, Jr., Labor Commissioner of the State of California, and Division of Labor Standards Enforcement, Department of Industrial Relations of the State of California (collectively referred to as "Aubry"). The remaining parties in the lower proceedings have not been named as respondents in this Court, as their interests are not adverse to ours, and we understand they will be filing their own separate petition for certiorari pursuant to Rule 19.4.

RULE 28.1 LIST OF RELATED CORPORATIONS

Petitioners Tidewater Marine Service, Inc. and Western Boat Operators, Inc. are wholly-owned corporate subsidiaries of Tidewater, Inc., a corporation whose stock is publicly traded. Although Tidewater, Inc. has a number of other subsidiary corporations related to petitioners, they are all wholly-owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Tidewater Marine Service, Inc., and Western Boat Operators, Inc. (collectively "Tidewater") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 13, 1990.

OPINIONS BELOW

The majority and dissenting opinions of the Ninth Circuit Court of Appeals are reported at 918 F.2d 1409 and are reprinted in the Appendix at A-1.

The opinion of the United States District Court for the Central District of California is reported at 709 F.Supp. 1516 and is reprinted in the Appendix at A-46.

JURISDICTION

The District Court's jurisdiction was based upon 28 U.S.C. § 1331 (federal question), § 1332 (diversity of citizenship) and § 1333(1) (admiralty). On March 1, 1989, the District Court granted petitioners' motion for summary judgment and entered declaratory and injunctive relief which prohibited respondents from enforcing state overtime regulations against seamen and maritime workers employed on the high seas and state territorial waters.

Respondents appealed the District Court's judgment pursuant to 28 U.S.C. § 1291 (final decisions). On November 13, 1990, the Ninth Circuit entered its judgment and majority opinion reversing the District Court, with a separate dissenting opinion. Petitioners filed a timely petition for rehearing and suggestion for rehearing en banc on November 27, 1990. The petition for rehearing was denied by the Ninth Circuit on May 28, 1991. See Appendix at A-45.

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1) by praying for a writ of certiorari to review the judgment and opinion of the Ninth Circuit.

STATUTES AND REGULATIONS INVOLVED

Section 13(b)(6) of the Fair Labor Standards Act, 29 U.S.C. § 213(b)(6), exempts seamen from land-based maximum hour and overtime standards. It reads:

> "The provisions of section 7 of this title [relating to maximum hours and overtime compensation] shall not apply with respect to —
>
> * * *
>
> (6) any employee employed as a seaman . . . . "

California Wage Order 4-80, 8 Cal. Code Regs. § 11040, regulates wages, hours and working conditions for professional, technical, clerical, mechanical and similar occupations. It is reprinted in the Appendix at A-68.

STATEMENT OF THE CASE

I.

BACKGROUND

Since the beginning of minimum wage, maximum hour and overtime laws more than fifty years ago, federal law has expressly exempted seamen from statutory overtime requirements. This principle is embodied in Section 13(b)(6) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 213(b)(6), a provision which Congress examined twice in extensive legislative hearings conducted in 1937 and 1961.[1] The seamen's exemption has

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[1]The FLSA originally exempted seamen from both minimum wage and overtime provisions. 52 Stat. 1067 § 13(a)(3), c. 676 (1938). In 1961 Congress amended the FLSA to apply the minimum wage to seamen, but it continued their overtime exemption. 75 Stat. 71, §§ 9 & 10 (1961). During both legislative sessions, Congress recognized the overtime exemption was appropriate because of the variable and

been refined by interpretive regulations issued by the Department of Labor, 29 C.F.R. §§ 783.29 *et seq.*, and by federal case law.

Federal cases and the FLSA legislative history have described two reasons for the longstanding exemption for seamen: (1) the pervasive degree of federal regulation which already exists over seamen's working conditions, hours of work, compensation and benefits, and (2) the variable and unpredictable nature of a seaman's workday, which does not lend itself to the rigid eight hour a day work standards inherent in land-based overtime regulations.[2]

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unscheduled working hours of seamen and the existing regulation of seamen's working conditions by federal maritime agencies. *E.g., Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Education and Labor and the House Comm. on Labor,* 75th Cong., 1st Sess. 544-549 (1937); *Hearings on S. 256, S. 879, S. 895 and Bills Amending the FLSA Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 87th Cong., 1st Sess. 376-379 (1961); S. Rep. No. 145, 87th Cong., 1st Sess. 32-33 (1961). *See also,* 29 C.F.R. § 783.0 *et seq.* (discussing the FLSA legislative history).

[2]*E.g., Lowrimoore v. Union Bag & Paper Co.,* 30 F.Supp. 647, 652 (S.D. Ga. 1939), *aff'd,* 116 F.2d 27 (5th Cir. 1940), *cert. denied,* 313 U.S. 559 (1941) ("A valid reason which seems to justify leaving seamen out of the effects of this Act is the practical difficulty of establishing by any satisfactory evidence what were their hours of work, when they as employees were always or nearly always subject to call, though a large and indeterminate portion of their time was not occupied with work."); *Walling v. Keansburg Steamboat Co.,* 162 F.2d 405, 407 n.6 (3d Cir. 1947) ("Seamen were exempted from operation of the Fair Labor Standards Act of 1938 so as to avoid conflict of jurisdiction and confusion of labor relations."); *Anderson v. Manhattan Lighterage Corp.,* 148 F.2d 971, 973 (2d Cir.), *cert. denied,* 326 U.S. 722 (1945) (same holding); *Weaver v. Pittsburgh Steamship Co.,* 153 F.2d 597 (6th Cir.), *cert. denied,* 328 U.S. 858 (1946) (noting that maritime unions strongly advocated the seamen's exemption to

Because of this extensive body of federal law, the seamen's exemption from maximum hour and overtime standards has become a firmly established fixture of admiralty law. With the exception of California, every state has followed and respected the federal overtime exemption for seamen. Ten of the states have done so by express statutory provisions which largely incorporate Section 13(b)(6) of the FLSA.[3]

Although seamen's overtime compensation has been expressly excluded from labor law statutes, the subject has long been addressed by federal admiralty law. From the very beginning of our nation's history, the terms and conditions of seafaring work have been governed by the employment agreement between master and seaman, as enforced and interpreted by federal law.[4] Seamen's overtime compensation has accordingly been treated as a matter of contract between master and seaman.[5] And when a seaman performs duties beyond the working

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avoid confusion in jurisdiction and labor relations concerning maritime employees).

[3]Alaska Stat. § 23.10.060; 1989 Connecticut Pub. Acts No. 89-24 (Reg. Sess.); Hawaii Rev. Stat. § 387-3(a); Kansas Stat. Ann. § 337.050; Maine Rev. Stat. Ann., tit. 26, § 664; Massachusetts Gen. Laws Ann., ch. 151, § 1A; Minnesota Stat. § 177.23(7) (1)-(19); North Carolina Gen. Stat. 95-25.14(c); Pennsylvania Min. Wage Act § 5(b); Washington Rev. Code. § 49.46.130(1).

[4]*E.g.*, *Bunn v. Global Marine, Inc.*, 428 F.2d 40, 46 (5th Cir. 1970); 1 Norris, *The Law of Seamen* § 6:1 (4th ed. 1985).

[5]*The Youngstown*, 28 F.Supp. 197, 199 (E.D. La. 1939), *aff'd*, 110 F.2d 968, 970 (5th Cir. 1940); *Jones v. American Export Isbrandtsen Lines, Inc.*, 285 F.Supp. 345, 346-47 (S.D.N.Y. 1968); *Kane v. American Tankers Corporation of Delaware*, 219 F.2d 637, 639 (2d Cir. 1955); *C.M. Rousseau, Jr. v. Teledyne Movable Offshore, Inc.*, 619 F.Supp. 1513, 1518-19 (D. La. 1985), *rev'd in part on other grounds*, 805 F.2d 1245 (5th Cir. 1986), *cert. denied*, 484 U.S. 827 (1987); *see*

period specified by contract, admiralty law recognizes an absolute right to fair compensation for the overtime performed.[6]

In addition, the Coast Guard regulates the maximum hours of work and specific working conditions of seamen serving on United States documented vessels. Following the standards set forth in the Shipping Act, the Coast Guard issues Certificates of Inspection which specify crewing requirements and the maximum hours of work at sea and in harbor conditions.[7] In the District Court proceedings, the Coast Guard Officer formerly in charge of the Southern California area submitted an undisputed declaration which described the Coast Guard's concern for the working conditions and maximum hours of work for seamen serving on United States documented vessels.[8]

II.

THE FACTS

This case arose in 1987, when California's labor law enforcement officials, Labor Commissioner Lloyd W. Aubry, Jr. and the Division of Labor Standards Enforce-

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also, Smith v. Reinauer Oil Transport, 256 F.2d 646, 652 (1st Cir. 1958).

[6]*The Lakme*, 93 F. 230, 231-32 (D. Wash. 1899); *Bender v. Waterman S.S. Corp.*, 69 F.Supp. 15, 19 (E.D.Penn. 1946); *The Carrier Dove*, 98 F. 313, 314 (D. Wash. 1899).

[7]46 U.S.C. §§ 8101 & 8104. Section 8104 is a recodification of 46 U.S.C. § 673, which was first enacted in 1915. *See* ch. 153, § 2, 38 Stat. 1164 (1915).

[8]Declaration of Captain Robert A. Janecek, USCG (Ret.), 31 CR 15-23. The declaration is reprinted in the Appendix at A-86.

ment (collectively "Aubry")[9] departed from the uniform practice of excluding seamen from overtime statutes. Aubry made this change by applying California Wage Order 4-80, 8 Cal. Code Regs. § 11040, to maritime employers operating in the Santa Barbara Channel off the coast of California.

Wage Order 4-80 says nothing about seamen, maritime workers or any other employees even remotely connected with the sea. It is instead a general regulation which applies to "professional, technical, clerical, mechanical and similar occupations," the definition for which is restricted to land-based employees such as accountants, clerks, librarians, dental technicians and secretaries. *See* 8 Cal. Code Regs § 11040 ¶ 2(c), Appendix at A-69-70.

Aubry first applied Wage Order 4-80 to maritime employees working for Clean Seas Association ("Clean Seas"). Clean Seas is an unincorporated association formed by major oil companies to contain and clean up marine oil spills in the Santa Barbara Channel. It operates three United States documented vessels which are crewed by officers and seamen licensed and certificated under federal law. One of the vessels is permanently stationed on a buoy approximately seven miles off the California coast, and the other two operate between local

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[9]Under California law, the Labor Commissioner is the chief officer of the Division of Labor Standards Enforcement. The Division has authority to investigate employee complaints concerning wages, hours and working conditions, and to resolve the complaints through informal administrative hearings held by deputy labor commissioners. Cal. Lab. Code §§ 79-105. Neither the Labor Commissioner nor the Division establish the state's minimum wage and maximum hour regulations, however. That function is performed by a separate agency, the Industrial Welfare Commission, which adopts Wage Orders through public rulemaking proceedings. Cal. Lab. Code §§ 1173-1182.1.

harbors and the high seas. Crew members live on board the Clean Seas vessels, serving approximately seven days on duty followed by seven days off.

In 1987 Aubry accepted overtime claims from twelve crew members of the Clean Seas vessels, rejecting Clean Seas' argument that Aubry's jurisdiction was preempted by federal admiralty law. In early 1988 Aubry issued overtime awards in favor of all the Clean Seas crew members, totaling $795,789.77. At the rate awarded, each crew member would have been entitled to approximately $70,000 in annual compensation.

Shortly after the award against Clean Seas, respondent Aubry accepted an overtime claim against Tidewater. Tidewater is a maritime firm which provides offshore transportation and support services throughout the world, and since 1964 it has provided crew and supply boat services to oil drilling platforms off the coast of California.

Tidewater's crew and supply vessels operate on the high seas and within state territorial waters.[10] In the Santa Barbara Channel, Tidewater provides transportation services to a number of oil drilling platforms lying from one to twelve nautical miles off the coast. This involves traditional seafaring activity and travel between the platforms and local harbors and from platform to platform. Tidewater's supply boats are 180 to 190 foot vessels and its crew boats are 65 foot vessels; both are

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[10]The United States exercises territorial rights over coastal waters up to three nautical miles from the low-water mark. The states may exercise limited police power functions within the territorial zone off their coasts, but the federal government has paramount rights and powers over the territorial seas. *United States v. California*, 332 U.S. 19 (1947).

equipped with a galley and living quarters for the crew. The vessels are on call twenty-four hours a day, resulting in work periods that are unscheduled and extraordinarily variable.

Crews on Tidewater's supply and crew vessels generally work a schedule consisting of seven days on duty followed by seven days off, and their duty periods correspond with manning requirements specified in the Shipping Act and the Coast Guard Certificates of Inspection. Although these duty periods often exceed eight hours in a twenty-four hour period, this reflects the fact that vessels are often inactive while waiting for a work assignment from platform operators. During these periods of inactivity, the vessel is docked or moored and crew members may sleep, eat, read, or otherwise engage in their own activities.

Tidewater's vessels and employees are subject to pervasive and uniform federal regulations. All of the vessels are federally documented, all masters are licensed by the Coast Guard, and all crew members have Merchant Mariner documents issued by the Coast Guard. Tidewater's vessels are inspected by the Coast Guard, which issues Certificates of Inspection specifying the manning requirements for twenty-four hour operation (including the number of crew and their maximum hours of work), the geographic area of operation, passenger or cargo limitations, and safety requirements. The Coast Guard also requires Tidewater to file monthly Certificates of Seaman's Service, describing the hours and capacity of work performed by each crew member.

Tidewater's crew members have the full range of protection and welfare benefits provided exclusively to seamen under federal admiralty law. They may seek recovery for injuries under the Jones Act, 46 U.S.C. § 688,

or for breach of the owner's duty to provide a seaworthy vessel, and they receive maintenance and cure benefits for illness or injury suffered during their period of service.

Throughout the twenty-four year period of Tidewater's operations in California, Tidewater's crew members have had employment agreements which provided for a flat daily rate of pay without overtime compensation. A daily rate of pay is the traditional method of compensating seamen used by Tidewater and other offshore maritime firms on United States documented vessels throughout the world, reflecting the variable hours of work by seamen and the prolonged periods of inactivity during a workday.

The administrative proceedings concerning Tidewater arose in February 1988, when Aubry accepted a complaint for overtime compensation filed by Frank Kleman in Santa Barbara. Kleman was employed as a deckhand on Tidewater's vessels in the Santa Barbara Channel under an employment agreement providing for a daily rate of pay without overtime compensation. Like Tidewater's other crew members, Kleman was a traditional seaman who held Merchant Mariner documents issued by the Coast Guard and enjoyed all seamen's benefits and protections afforded by federal law.

Aubry sought overtime compensation of approximately $50,000 for Kleman, covering one year of his employment with Tidewater. Since Kleman's annual earnings with Tidewater were about $25,000, the overtime represented two times his annual pay. As in the case of the complaint against Clean Seas, Aubry asserted jurisdiction over Tidewater on the basis of Wage Order 4-80. Tidewater made a timely motion to dismiss Kleman's overtime complaint on the ground of federal admiralty preemption, which Aubry denied. However, Aubry agreed to stay all

proceedings on the claim by Kleman (as well as other seamen) after Tidewater filed its complaint in this action.

III.

THE PROCEEDINGS BELOW

This action was filed in February 1988 by Clean Seas and several maritime trade associations concerned about Aubry's effort to regulate seamen. Plaintiffs' complaint sought declaratory and injunctive relief on the ground that Aubry's jurisdiction over seamen and maritime employees was preempted by federal admiralty law. The District Court permitted Tidewater to join in the action as a plaintiff-intervenor in June 1988.

Following cross-motions for summary judgment by the parties, the District Court (Judge A. Wallace Tashima) granted summary judgment in favor of Tidewater and the Clean Seas plaintiffs on March 1, 1989. The District Court declared that Aubry's jurisdiction over seamen was preempted by federal admiralty law and it issued a permanent injunction which prohibited Aubry from enforcing overtime regulations against seamen or maritime employees.

In reaching this result, the District Court followed the constitutional requirement of a uniform system of admiralty law, citing this Court's decisions in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407 (1976), and *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986). The District Court found that such uniformity was impossible because state and federal law "produce widely differing results" when applied to the seamen involved in this case. 709 F.Supp. at 1524, Appendix at A-61.

The District Court rejected Aubry's argument that state regulation of seamen was permitted by Section 18(a) of the FLSA, 29 U.S.C. § 218(a), a savings clause which permits states to enact a higher minimum wage or lower maximum workweek than federal law. The District Court held that Aubry's attempt to regulate overtime compensation for seamen impaired maritime uniformity because it squarely conflicted with the purpose and overall scheme of the seamen's exemption under the FLSA:

> "Congress has spoken directly on the issue of overtime pay for seamen. Therefore, California labor laws are preempted to the extent that they presume to regulate FLSA exempt seamen, both on the high seas and within the territorial zone. Further, given Congress' exemption of these seamen from even minimal federal overtime provisions, it would be at odds with the federal scheme to permit the states to enforce stricter overtime provisions via the FLSA's savings clause." 709 F.Supp. at 1525; Appendix at A-64.

The Ninth Circuit reversed the District Court on November 13, 1990, issuing a majority opinion (by Judges Harry Pregerson and James R. Browning) and a separate dissenting opinion (by Senior Judge William P. Copple, sitting by designation). Unlike the District Court, the Ninth Circuit applied an unusually rigorous preemption standard, requiring evidence of a "*clear and manifest* purpose of Congress" to preclude state regulation. 918 F.2d at 1416, Appendix at A-11 (emphasis in original).

The Ninth Circuit's majority opinion found that Aubry's application of Wage Order 4-80 created maximum hour standards that differed sharply from those set forth in the Shipping Act, 46 U.S.C. § 8104, and enforced

by the Coast Guard. Nevertheless, the majority turned to an earlier Ninth Circuit decision involving a non-maritime conflict between state overtime laws and the Motor Carrier Act, 49 U.S.C. §§ 3101-04.[11] Relying on that decision, the majority held that Aubry's actions were not preempted because it was technically possible for Tidewater and Clean Seas to comply with both sets of laws. 918 F.2d at 1416-17, Appendix at A-13-14.

Like the District Court, the Ninth Circuit majority found a conflict between Aubry's regulations and the seamen's exemption under the FLSA. But the majority held that preemption was improper because there was no evidence that Congress had *expressly prohibited* state overtime regulation of seamen:

> "At no time has Congress expressly prohibited states from applying their overtime laws to seamen. Further, PMSA and Tidewater point to nothing in the legislative history of § 213(b)(6)— either in the 1938 act or in the 1961 amendments to the FLSA — that suggests that Congress intended to preclude application of state overtime provisions to seamen. Our review of legislative history has revealed no such congressional intent." 918 F.2d at 1418, Appendix at A-16 (footnote omitted).

The Ninth Circuit majority also considered whether the conflict between state and federal overtime standards violated the requirement of maritime uniformity described in this Court's decisions in *Jensen, supra*, 244 U.S. at 216, *Knickerbocker, supra*, 253 U.S. at 164, and *Tallentire, supra*, 477 U.S. at 228. The majority rejected the District Court's analysis and concluded that the federal

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[11] *Agsalud v. Pony Express Courier Corp.*, 833 F.2d 809 (9th Cir. 1987).

scheme of maritime regulation and interest in maritime uniformity were outweighed by California's interest in regulating seamen. In so holding, the majority once again pointed to Congress' failure to *expressly prohibit* state regulation of seamen and to the *local nature* of the maritime activity involved in this case:

> "There is no indication that Congress, in enacting the FLSA's savings clause, intended to preempt states from according more generous protection to maritime employees on the high seas off a state's coastal waters. Further, the purpose behind the FLSA is to establish a national *floor* under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA.
>
> "Most important, because the maritime employees involved in this action are California residents who work on vessels that operate exclusively off the California coast, application of the state's overtime law will not disrupt international or interstate commerce." 918 F.2d at 1425, Appendix at A-33-34 (emphasis in original).

One member of the Ninth Circuit panel dissented from the decision, concluding that Aubry's actions were preempted both by general principles of admiralty law and the FLSA. As for the former, the dissent argued that California overtime regulations conflicted with the long-standing admiralty principle that overtime is a matter of contract between master and seaman. The dissent noted that individual contractual arrangements are more suitable than fixed regulations to the variable conditions of maritime employment:

> "This interpretation makes sense in light of the fact that the conditions under which maritime employees work, especially those working on the high seas, are substantially different from land-based employees. Land-based employees are able to return home every night after work whereas often in maritime situations employees are required to be transported to a work station on the high seas, remain at sea for days at a time and subsequently be transported back to land. This aspect of maritime life has not changed for centuries and must have been understood at the inception of admiralty law." 918 F.2d at 1429, Appendix at A-41-42.

The dissent also concluded that Aubry's actions were preempted by the direct conflict between California overtime regulations and the seamen's exemption under the FLSA. Adopting the same analysis as the District Court, the dissent argued that Congress' specific decision to exempt seamen from overtime coverage did not leave room for contrary state regulation. 918 F.2d at 1430, Appendix at A-44.

REASONS FOR GRANTING THE WRIT

As we have explained, the subject of maximum hours and overtime compensation for seamen has not been excluded from federal admiralty law. It has instead been addressed in three ways: (1) seamen's overtime has historically been a matter of contract between master and seaman, (2) seamen's maximum hours of work have been regulated by the Shipping Act and the Coast Guard's manning standards and Certificates of Inspection, and (3) on two separate occasions Congress has specifically

excluded seamen from the land-based overtime standards of the FLSA.[12]

The Ninth Circuit majority has permitted Aubry to supersede this body of federal admiralty law by regulating the maximum hours and overtime compensation of seamen with a general land-based Wage Order that says nothing whatsoever about maritime employment. It has reached this anomalous result by applying a preemption analysis which directly conflicts with decisions of this Court and establishes new standards for state regulation of maritime employment on the high seas. The end result is a decision of enormous importance and widespread impact within the maritime industry. Certiorari is accordingly proper and should be granted.

I.

THE NINTH CIRCUIT MAJORITY OPINION APPLIES AN ADMIRALTY PREEMPTION ANALYSIS THAT CONFLICTS WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS

A. The Ninth Circuit Majority Opinion Conflicts with *Jensen's* Requirement of Maritime Uniformity

This Court has long emphasized the need for uniformity in federal admiralty law, based upon the federal courts' responsibility for "all cases of admiralty and maritime jurisdiction." U. S. Const., art. III, § 2, cl. 1. The Court reiterated the need for maritime uniformity as recently as last term in *Miles v. Apex Marine Corp.*, ____ U.S. ____, 111 S.Ct. 317, 322, 112 L.Ed.2d 275 (1990), *quoting Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970), and *The Lottawanna*, 88 U.S. 558, 575 (1874).

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[12]See discussion, *supra*, at pages 3-6.

The principle of maritime uniformity has led this Court to guard against intrusive regulation of maritime affairs by the states. For example, in the early case of *The Lottawanna, supra,* the Court declared:

> "One thing, however, is unquestionable: the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the Rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed . . . ." 88 U.S. at 575.

In *Southern Pacific Co. v. Jensen, supra,* 244 U.S. at 217, the Court held that federal admiralty law preempted application of state workers' compensation laws to maritime employees because "[t]he necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously impeded." *Accord, Knickerbocker Ice Co. v. Stewart, supra,* 253 U.S. at 166; *State of Washington v. W. C. Dawson & Co.,* 264 U.S. 219, 227-28 (1924).

The majority decision by the Ninth Circuit is plainly inconsistent with these cases and with other decisions which have preempted fragmented state regulation of maritime activity.[13] If the states are not free to regulate

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[13] *E.g., Offshore Logistics, Inc. v. Tallentire, supra,* 477 U.S. 207 (1986) (refusing to apply state law to oil platform workers killed on the high seas); *Ray v. Atlantic Richfield Co.,* 435 U.S. 151 (1978) (refusing to apply Washington design standards for oil tankers); *Kossick v. United Fruit Co.,* 365 U.S. 731 (1961) (refusing to apply

workers' compensation remedies for seamen and maritime workers, the result can be no different for seamen's maximum hours of work and compensation for overtime. In either instance maritime uniformity is destroyed by a system of fragmented and conflicting laws which differ greatly from federal admiralty law and which are subject to change from one state to another.

B. The Ninth Circuit Majority Opinion Incorrectly Requires Express Congressional Intent to Preclude State Regulation

The Ninth Circuit's majority decision conflicts with decisions of this Court not only in its overall holding, but also as to the particular form of preemption analysis which was applied. Throughout the decision, the majority was guided by "the assumption that the historic powers of the States were not to be superseded by [federal legislation] unless that was the *clear and manifest* purpose of Congress." 918 F.2d at 1416, Appendix at A-11 (emphasis in original).

This form of preemption analysis is completely foreign to maritime law and entirely at odds with the constitutional requirement for maritime uniformity.[14] This Court's decisions have emphasized the practical consequences of

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New York statute of frauds to seaman's oral contract concerning medical care); *Union Fish Co. v. Erickson,* 248 U.S. 308 (1919) (refusing to apply California statute of frauds to a seaman's oral contract of employment); *Lord v. Goodall,* 102 U.S. 541 (1881) (refusing to apply California contract law in place of admiralty rules limiting a vessel owner's liability in a breach of contract action for damage to cargo).

[14]It also requires extraordinary foresight on the part of Congress. Because there were no states which even attempted to regulate overtime compensation for seamen in 1937 and 1961, Congress hardly had reason to consider the question of state preemption.

fragmented state regulation, not the need for express Congressional intent to preclude state action. Indeed, in *Jensen* and *Knickerbocker, supra,* the Court refused to permit enforcement of workers' compensation laws in the face of express Congressional intent to *permit* state regulation — simply because the practical consequence would produce fragmentation and confusion.

The approach taken by the Ninth Circuit majority also ignores the concept of "negative preemption" which this Court described in *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 178 (1978):

> "The Court has previously recognized that 'where failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved . . .' States are not permitted to use their police power to enact such a regulation."

quoting Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 774 (1947). *Accord, Napier v. Atlantic Coast Line,* 272 U.S. 605 (1926); *Norfolk & Western Ry. v. Pub. Utilities Comm.,* 926 F.2d 567, 570 (6th Cir. 1991); Friedell, *Benedict on Admiralty,* § 112, p. 7-37 ("As the Supreme Court has long recognized, the absence of a federal right of recovery may suggest a strong federal interest, and when a state 'supplements' the federal law by adding a cause of action it thereby deprives the defendant of a substantive right to be free of an obligation.").

This holding is certainly applicable here. Congress has expressly declared in Section 13(b)(6) of the FLSA that seamen should be exempt from land-based maximum hour and overtime standards. This was the product of legislative hearings in 1937 at which Congress accepted testi-

mony about the peculiar and variable working hours of seamen and the dangers of confusion between maritime and labor regulations.[15] Congress reexamined the issue in 1961, concluding that only the FLSA minimum wage provisions should be extended to seamen.[16] In short, Congress did not leave out seamen because of oversight or neglect — it carefully and deliberately drew a line that excludes seamen from land-based overtime regulations.[17]

The underlying rationale for Congress' exclusion of seamen from the FLSA applies with even greater force to state overtime laws. Land-based labor standards, whether state or federal, are equally inappropriate for the variable workday of a seaman. And there is much greater opportunity for confusion between labor and maritime regulations when multiple state jurisdictions are involved.

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[15] *See* legislative materials, *supra,* note 1 at page 3.

[16] When applying the minimum wage to seamen, Congress was careful to enact special provisions which recognize the unique working hours of seamen. Section 6(a)(4) of the FLSA accordingly prescribes a special minimum wage computation for seamen, based upon the hours they are "actually on duty" and not just on call. 29 U.S.C. § 206(a)(4). *See also,* S.Rep. No. 145, 87th Cong., 1st Sess. 32-33 (1961) (explaining legislative intent).

[17] That line has been extended by a substantial body of law, consisting of federal regulations and court decisions, which define the precise scope of the seamen's exemption. Following the intent of Congress, they distinguish land-based and traditional seafaring activity by applying the seaman's exemption only to "one who performs service primarily to aid in the operation of a vessel as a means of transportation." *Worthington v. Icicle Seafoods, Inc.,* 774 F.2d 349, 353 (9th Cir. 1984), *vacated on other grounds,* 475 U.S. 709 (1986); *Donovan v. Nekton, Inc.,* 703 F.2d 1148 (9th Cir. 1983); 29 C.F.R. § 783.29.

C. The Ninth Circuit Majority Opinion Incorrectly Applies a More Lenient Preemption Standard to Maritime Operations in Local Waters

In upholding A..ory's regulation of seamen, the Ninth Circuit majority emphasized that preemption was improper because the affected employees were California residents who worked on vessels operating in local waters off the California coast. 918 F.2d at 1425, Appendix at A-34. This aspect of the majority's preemption analysis constitutes a sharp departure from decisions of this Court.

Federal admiralty jurisdiction includes all navigable waters which may be used in commerce.[18] This Court's decisions have recognized the need for maritime uniformity wherever admiralty jurisdiction extends, with equal attention to state territorial waters and the high seas. *E.g., Moragne v. States Marine Lines, Inc., supra,* 398 U.S. 375 (establishing a uniform federal maritime remedy for wrongful death within state territorial waters).

Unlike the Ninth Circuit majority, this Court has recognized no lesser standard of preemption for vessels operating in local waters. *Lord v. Goodall*, 102 U.S. 541 (1881), held that federal admiralty law preempted state statutes concerning a vessel which operated an exclusive route between San Francisco and San Diego off the coast of California. Similarly, in *London Co. v. Industrial Commission*, 279 U.S. 109 (1929), the Court found preemption of

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[18] *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31, 41 (1942) ("It has long been settled that the admiralty and maritime jurisdiction of the United States includes all navigable waters within the country."); G. Gilmore and C. Black, *The Law of Admiralty* § 1-11 at 31 (2d ed. 1975).

state law concerning an accident which occurred only three-quarters of a mile off the coast of California.

By the same token, the Court has applied preemption even when there are strong local contacts between a maritime transaction and a particular state. In *Union Fish Co. v. Erickson*, 248 U.S. 308 (1919), the Court refused to apply California's statute of frauds to a seaman's oral contract of employment made within the state, holding that maritime uniformity would have been defeated by fragmented state regulation. The Court reaffirmed that holding more than forty years later in the face of even stronger local contacts in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961).

D. The Ninth Circuit Majority Opinion Creates Unprecedented and Expansive Powers for State Regulation of Maritime Activity on the High Seas

The issues in this case involve application of state overtime regulations to vessels which normally operate on the high seas. Tidewater's vessels regularly travel between oil platforms up to twelve miles off the coast, and they are permitted by the Coast Guard Certificates of Inspection to operate up to 100 miles from the mainland shore. The District Court accordingly made it clear that Aubry is attempting to regulate seamen "employed on vessels situated primarily on the high seas," and the Ninth Circuit agreed. 709 F.Supp. at 1517, 918 F.2d at 1415, Appendix at A-46 & 11.

In *Oil Workers v. Mobil Oil Corp., supra*, 426 U.S. 407, this Court decided whether the National Labor Relations Act savings clause, 29 U.S.C. § 164(b), permitted application of the Texas right-to-work laws to seamen employed on United States documented oil tankers operating principally on the high seas. The lower courts held that Texas

law applied because of the substantial state interests in regulating the seamen's employment and the predominant state contacts with the hiring and employment process. This Court reversed, holding that the predominant job situs was the proper standard for measuring applicability of state law. Since the vessels operated primarily on the high seas, the Court held that neither Texas nor any other state had a sufficient interest in the employment relationship to apply its state laws. 426 U.S. at 412-21.

The Court took a similar approach in *Offshore Logistics, Inc. v. Tallentire, supra*, 477 U.S. 207. That case involved the question whether the savings clause under the Death on the High Seas Act, 46 U.S.C. § 761, permitted application of the Louisiana wrongful death statute to oil platform workers killed in a helicopter crash on the high seas. Despite extensive contacts between the workers and Louisiana, the Court held that state law did not apply. Emphasizing the importance of uniform maritime remedies for death on the high seas, the Court interpreted the savings clause as permitting state court jurisdiction over wrongful death actions but precluding application of state substantive law. 477 U.S. at 220-233.

The decision by the Ninth Circuit majority is plainly at odds with *Mobil Oil* and *Tallentire*. The majority decision permits Aubry to apply state overtime standards to seamen whose predominant workplace is on the high seas and beyond state territorial waters. This cannot be reconciled with the heightened need for maritime uniformity on the high seas, which was a decisive factor in *Mobil Oil* and *Tallentire*.

Because of the strong local interest in protecting the shoreline from environmental harm, some of this Court's decisions have permitted limited state regulation of shipping activity — but only within the three-mile state terri-

torial zone. *See Ray v. Atlantic Richfield Co., supra*, 435 U.S. 151 (permitting application of a state statute concerning tug-escorts for certain tankers in confined waters); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) (permitting application of a state statute concerning oil spill damage to the shoreline); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (permitting application of city air pollution regulations to tankers within a harbor).

The Ninth Circuit's majority decision dramatically expands this limited authority by permitting state regulatory activity on the high seas and beyond the state territorial zone. That expansive interpretation is neither permitted by this Court's decisions nor consistent with *Mobil Oil* and *Tallentire*.

II.

THIS CASE INVOLVES IMPORTANT ISSUES AFFECTING FEDERAL ADMIRALTY LAW AND THE MARITIME INDUSTRY

A. The Ninth Circuit Majority Opinion Will Have Great Impact in the Maritime Industry

This is by no means a case with limited importance or application. Because these proceedings arose in California, this case necessarily has a great impact on the United States maritime industry. According to figures compiled by the Bureau of Labor Statistics, more than 11.31 percent of all United States maritime employees are based in California.[19]

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[19]U.S. Dept. of Labor, Bureau of Labor Statistics, Employment & Wages Annual Averages 1989 (Bull. 2373, October 1990), at pp. 326-331.

The State of California has a similarly disproportionate share of maritime employees in the offshore sub-industries that will be most affected by Aubry's jurisdiction: water transportation services (10.96% of all U.S. employees), water passenger transportation (10.59% of all U.S. employees), water ferries (12.10% of all U.S. employees), marine cargo handling (15.29% of all U.S. employees), and towing and tugboat services (7.05% of all U.S. employees).[20]

In one fell swoop, the Ninth Circuit majority decision has accordingly removed the longstanding seamen's exemption for more than one out of every ten offshore maritime employees in the United States. The impact will of course be greater if Wage Order 4-80 is applied more broadly to deep water maritime employees in California,[21] or if additional states apply their overtime provisions to offshore or deep water vessels. As the Ninth Circuit includes all states bordering the Pacific Coast, the precedential effect of this case would expressly permit all of those states to apply their overtime laws (and perhaps other labor regulations) to seamen as well.[22]

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[20] *Id.*

[21] This is by no means a hypothetical possibility, for as the District Court found, Aubry has claimed the right to regulate seamen who are non-California residents and seamen who serve on vessels operating outside the territorial waters of California. 709 F.Supp. at 1521, Appendix at A-53-54.

[22] The Ninth Circuit majority opinion also serves to add confusion to legal principles governing federal maritime preemption of state laws. Commentators have already recognized this to be an area of great confusion in need of clarification by this Court. *E.g.*, Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 Sup. Ct. Rev. 158 (1960); Ruhl, *Finding Federalism in the Admiralty: 'The Devil's Own Mess' Revisited*, 12 Tul. Maritime L.J. 263 (1988).

From an economic and operational standpoint, the Ninth Circuit's decision will also have an enormous impact on maritime employers. The Shipping Act and Coast Guard Certificates of Inspection for offshore vessels now set a maximum work period of twelve hours per day on crew and supply boats like those operated by Tidewater.[23] As the Coast Guard Officer who submitted a declaration to the District Court explained, reliance upon these federal standards has created an accepted and customary twelve hour work day throughout the offshore maritime industry.[24]

Continuing these customary practices in the face of Aubry's state overtime regulations is simply not a feasible alternative. Wage Order 4-80 requires premium overtime pay at one and one-half or two times the regular rate of pay for work exceeding eight hours in any day, the first eight hours on the seventh day of work, and forty hours in any week. 8 Cal. Code Regs. § 11040, ¶ 3(A), Appendix at A-71-72. The customary twelve hour workday would therefore produce at least four hours of premium pay *each day* (or six additional hours of regular pay at the one and one-half overtime rate) — resulting in seamen earning considerably more than the master of their vessels. The full measure of the economic disruption is shown by Aubry's overtime awards against Clean Seas and complaint against Tidewater, which resulted in total compensation

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[23]46 U.S.C. § 8104(b); Declaration of Capt. Robert A. Janecek, USCG (Ret.) at ¶ 11, Appendix at A-88-89.

[24]Janecek Declaration, *supra*, at ¶ 13, Appendix at A-89-90 ("In all of the years I have been involved in supervising the manning requirements for crew boats and supply boats of the type operated by Tidewater, I have always considered and understood the twelve hour shift to be the normal workday for seamen (including officers) serving on these type vessels.").

nearly *three times* the seamen's base earnings which they contracted for.[25]

The economic pressures caused by Aubry's maximum hour standards would accordingly require maritime employers to restructure seamen's work periods to come closer to the land-based standards prescribed by Wage Order 4-80, without regard to the operational needs of the vessels or their work. This will necessarily require premium overtime pay, the employment of a greater number of seamen, and correspondingly higher costs to maritime employers.

These dramatically higher employment costs would have a depressing impact on individual maritime employers and the entire industry. During the past three decades, United States maritime employment has declined sharply and steadily. The Bureau of Labor Statistics reports that the number of United States maritime employees has dropped 22.6 percent between 1964 and 1989.[26] Quite clearly, the industry does not need an additional economic burden to enhance this downward spiral.

B. The Ninth Circuit Majority Opinion Will Create Confusion and Uncertainty

Presently there are uniform conditions in maritime employment on United States documented vessels throughout the world: maximum hours are determined by the Shipping Act and Coast Guard Certificates of Inspection, seamen are exempt from statutory overtime provi-

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[25] *See* discussion, *supra* at pages 8 and 10.

[26] U.S. Dept. of Labor, Bureau of Labor Statistics, Employment, Hours, & Earnings, United States, 1909-90 (Bull. 2370, March 1991), at pp. 706-707.

sions, and overtime compensation is a matter of contract. By permitting Aubry to apply Wage Order 4-80 to seamen in California, this uniformity will be destroyed and replaced by confusion and uncertainty.

Wage Order 4-80 is a completely inappropriate tool for regulating the work of seamen and maritime employees. It expressly applies to "professional, technical, clerical, mechanical and similar occupations," which the order describes as employees such as office workers, cashiers, librarians, salespersons and bank tellers. 8 Cal. Code Regs. § 11040, ¶ 2(C), Appendix at A-69-70. Seamen on Tidewater's vessels have nothing in common with these land-based employees or with the nine-to-five workday that they typically follow. Seamen in the offshore maritime industry often live aboard their vessels and always have prolonged periods of inactivity and rest. Wage Order 4-80 takes none of these unique working conditions into account.

The Ninth Circuit majority opinion is based on the unrealistic assumption that maritime employers can easily identify the vessels and crew members to which state regulations like Wage Order 4-80 would apply. But vessels are moving worksites which commonly operate between states or in gulfs, rivers and bays that cannot be clearly identified with any particular jurisdiction. And crews are commonly composed of seamen who reside in different states. Under these circumstances typical of maritime employment, governing work and overtime standards would differ according to the location of the vessel or the residence of each crew member. These distinctions are unworkable and impossible to administer effectively.

The resulting confusion would expand in geometric proportions if other states followed the lead of California by applying their overtime regulations to seamen. By way

of example, there is no uniform state maximum hour standard among the Pacific Coast states. Washington and Oregon recognize the forty hour work week as their standard for maximum hours of work, but Alaska and California limit work to eight hours in any twenty-four hour period.[27] If these variable state regulations are applied to vessels operating along the Pacific Coast or to maritime employers like Tidewater with vessels in more than one state, it will be necessary to comply with different overtime standards depending upon the waters in which a vessel is located.

In short, the existing maximum hour standards of the Shipping Act and the Coast Guard are much better suited to maritime employment. Since 1915, Congress has consistently mandated the maximum hour standards for seamen serving on United States documented vessels, through its enactment of statutes such as 46 U.S.C. § 8104. And Congress has given the Coast Guard the exclusive authority to determine the manning and hours standards aboard vessels operating in state, federal and international waters, through individual Certificates of Inspection based upon federal law and a careful evaluation of each vessel and its working conditions. Through this comprehensive federal scheme, Congress has recognized that Coast Guard officers — not state authorities — are experts who know the sea and the unique conditions under which vessels and their crews operate. For more than fifty years Congress has therefore exempted seamen from the FLSA's maximum hours and overtime provisions, expressly recognizing that special rules must apply to maritime employment.

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[27]Wash. Rev. Code § 49.46.130(h); Or. Rev. Stat. § 653.261; Alaska Stat. § 23.10.060; 8 Cal. Code Regs. §§ 11010-11150 at ¶ 3(A).

Allowing Aubry and other state officials to suddenly and arbitrarily redefine the customs and practices in the maritime industry and displace the Shipping Act and Coast Guard expertise is flatly inconsistent with this Court's directive to maintain uniform and consistent principles of federal admiralty law. Aubry's effort to regulate the unique working conditions of seamen with a Wage Order that applies to librarians and bank tellers is a clear conflict with federal maritime law which will wreak havoc in the maritime industry. It is a classic case of someone stubbornly trying to pound a square peg into a round hole — with profound confusion and cost to all who are affected.

CONCLUSION

For the foregoing reasons, review by this Court is appropriate and certiorari should be granted.

Respectfully submitted,

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July 17, 1991

APPENDIX

FOR PUBLICATION

United States Court of Appeals
FOR THE NINTH CIRCUIT

PACIFIC MERCHANT SHIPPING ASSOCIATION;
AMERICAN INSTITUTE OF MERCHANT SHIPPING;
OFFSHORE MARINE SERVICE ASSOCIATION;
WESTERN OIL AND GAS ASSOCIATION;
CLEAN SEAS,
Plaintiffs-Appellees,

vs.

LLOYD W. AUBRY, JR.,
Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California,
Defendant-Appellant,

vs.

TIDEWATER MARINE SERVICE, INC.;
WESTERN BOAT OPERATORS, INC.,
Plaintiff/Intervenors-Appellees.

No. 89-55379 D.C. No. CV-88-0848-AWT

OPINION

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Argued and Submitted
June 5, 1990 — Pasadena, California

Filed November 13, 1990

Before: James R. Browning and Harry Pregerson, Circuit Judges, and William P. Copple, District Judge.*

*The Honorable William P. Copple, Senior United States District Judge, District of Arizona, sitting by designation.

OPINION

PREGERSON, Circuit Judge:

Lloyd W. Aubry ("Aubry"), California's labor commissioner, enforced California's overtime pay laws against Clean Seas, an employer operating vessels off the California coast. Pacific Merchant Shipping Association and other shipping associations[1] ("PMSA") brought suit in the district court on behalf of Clean Seas and other member companies, seeking declaratory and injunctive relief on the ground that California's overtime pay laws are preempted by federal admiralty law. Tidewater Marine Service, Inc., and Western Boat Operations, Inc. ("Tidewater") intervened in the action after an employee filed an overtime wage claim with the California Division of Labor Standards Enforcement. The district court granted summary judgment for PMSA and Tidewater, declared Aubry's actions preempted by federal admiralty law, and enjoined further enforcement of California's overtime pay laws against Clean Seas, Tidewater, and other maritime employers. *Pacific Merchant Shipping Ass'n v. Aubry,* 709 F. Supp. 1516 (C.D. Cal. 1989). We have jurisdiction over the district court's final order under 28 U.S.C. § 1291. We reverse.

BACKGROUND

I. Admiralty Terminology

At the outset, and for the sake of clarity, we explain basic admiralty terminology used by the district court and in this opinion.

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[1]American Institute of Merchant Shipping; Offshore Marine Service Association; Western Oil and Gas Association.

A. Maritime Employees:

Historically, those who work on ships have been called "seamen." As a matter of general maritime law, the term "seamen" includes a broad range of marine workers whose work on a vessel on navigable waters contributes to the functioning of the vessel, to accomplishment of its mission, or to its operation or welfare. *See* 46 U.S.C. § 10101(3); Norris, *The Law of Seamen,* §§ 2.1, 2.3, 2.10 (4th ed. 1985). "Seamen" is also used, in a much narrower sense, in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, to define a category of maritime workers *exempted* from coverage under federal overtime pay provisions. *See* 29 U.S.C. § 213(b)(6).[2] Under federal regulations, a "seaman" exempted from the FLSA's overtime pay provisions is one who works "primarily as an aid in the operation of [a] vessel as a means of transportation, provided he performs no substantial amount of work of a different character." *See* 29 C.F.R. § 783.31 (1989). A "substantial amount of work of a different character" is more than 20 percent of the time worked by an employee during any given work week. 29 C.F.R. § 783.37 (1989).

This appeal involves workers who are FLSA-exempt "seamen" and workers who, while not exempted from the FLSA's overtime pay provisions, are still "seamen" in the broader, general sense. Because the distinction is impor-

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[2]Under the FLSA, with certain exceptions, all hours worked in excess of 40 hours per week must be compensated at "a rate not less than one-and-one-half times the regular rate." 29 U.S.C. § 207(a)(1). The statute also provides in relevant part:

> The provisions of section 207 of this title shall not apply with respect to —
>
> (6) any employee employed as a seaman . . . .

29 U.S.C. § 213(b).

tant, and to avoid confusion, we use the following terms to describe the employees affected by this opinion: a "maritime employee" is a "seaman" in the general maritime sense; and a "seaman" is a maritime employee exempted from the FLSA's overtime pay provisions under 29 U.S.C. § 213(b)(6).

B. Seas:

Two zones of "navigable waters" are involved in this appeal. The "territorial sea" is the sea from shore to three nautical miles off shore. The "high seas" are ocean waters outside the territorial sea, i.e., more than three miles offshore.

C. Voyages:

The Shipping Act, 46 U.S.C. §§ 2101-14701, divides "voyages" into three types. "Foreign voyages" are voyages between ports in the United States and ports in foreign countries (except Canada, Mexico, and the West Indies). *See* 46 U.S.C. § 10301(a)(1). "Intercoastal voyages" are voyages between ports on the Atlantic and Pacific coasts. *See* 46 U.S.C. § 10301(a)(2). "Coastwise voyages" are voyages "between a port in one State and a port in another State (except an adjoining State)." *See* 46 U.S.C. § 10501(a). United States Coast Guard regulations define "coastwise vessels" as those "normally navigating the waters of any ocean or the Gulf of Mexico 20 nautical miles or less offshore." 46 C.F.R. § 70.10-13 (1988).

II. Facts and Procedural History

PMSA and the other associations involved in this appeal are maritime trade associations that represent merchant maritime shippers, other maritime employers,

and employers in the oil and gas industry. Among these organizations' members are Clean Seas and Tidewater. Clean Seas is an unincorporated, cooperative association, formed by several major oil companies to contain and clean up marine oil spills off the California coast. Tidewater provides offshore transportation and support services worldwide, and provides transportation services to oil drilling platforms from one to 12 nautical miles of the California coast.

Clean Seas operates three vessels: *Mr. Clean, Mr. Clean II,* and *Mr. Clean III.* The employees whose wage claims led to this appeal work on *Mr. Clean II* and *Mr. Clean III* (three on *Mr. Clean II;* nine on *Mr. Clean III*). Both vessels' duties involve control and clean up of oil spills and other environmentally hazardous discharges in the Santa Barbara Channel off the California coast. *Mr. Clean II* is a 138-foot vessel moored in Port San Luis Harbor, California, where it remains moored approximately one-quarter mile offshore about 90 percent of the time. *Mr. Clean III* is a 181-foot vessel permanently stationed on the high seas off the California coast. *Mr. Clean III* conducts containment and clean up operations around four oil drilling and production platforms over the Pedernales and Arguello oil fields, from four to ten nautical miles off the California coast. When not on active duty, *Mr. Clean III* is tied to a buoy approximately seven miles off the California coast.

Clean Seas employees who work on *Mr. Clean III* are organized into two crews of six.[3] Each crew works seven day "hitches" at sea, alternating with seven day rest periods on shore. While at sea, Clean Seas employees

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[3]The record does not indicate whether *Mr. Clean III* crewmembers are organized this way.

typically work 12 hour shifts, alternating with 12 hour rest periods. *Mr. Clean III* crew members are transported to the vessel by helicopter from the Santa Barbara Airport. Of the 12 Clean Seas employees involved in the underlying action, two were licensed "mates" and ten, who worked primarily on clean up operations, were certified as "seamen" by the United States Coast Guard.[4] The specific terms of Clean Seas' employees' work are usually set out in contracts negotiated between each employee and Clean Seas.

Tidewater operates two types of vessels off the California coast. Tidewater's supply boats are 180- to 190-foot vessels with seven-member crews that pick up and deliver cargo at the Port Hueneme Pier, south of Santa Barbara, for delivery at various offshore oil platforms. Tidewater's crew boats are 65-foot vessels with two-member crews that transport passengers, light supplies and mail from

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[4]Under applicable federal regulations, the United States Coast Guard inspects vessels and issues certificates to qualifying maritime employees. *See* 46 C.F.R. §§ 71.01-71.75 (1988). A "mate" is a "qualified officer in the deck department other than the master." 46 C.F.R. § 10.103 (1989). Marine employees are certified as "seamen" upon meeting a range of age and training requirements. 46 C.F.R. §§ 12.01-1 to 12.25-40 (1989). Certification as a "seaman" under Coast Guard regulations does not bear on an employee's status as a "seaman" for purposes of exemption from federal overtime laws under 29 U.S.C. § 213(b)(6). *See* 29 C.F.R. 783.31-.37 (1989).

The district court made no findings on the question whether Clean Seas' employees were FLSA-exempt seamen. That question is one of fact, and must be decided by the district court. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714, *on remand, Worthington v. Icicle Seafoods, Inc.*, 796 F.2d 337 (9th Cir. 1986). In this case, however, because we hold that California may apply its overtime provisions to both the FLSA-exempt seamen and the non-exempt maritime employees involved in this suit, we need not remand the case to the district court to determine the status of Clean Seas' employees.

the Carpinteria and Ellwood piers, also near Santa Barbara, to offshore oil platforms. These vessels are on call at all times. When a vessel is called, it goes to a pier to pick up cargo or passengers, travels to its destination, and then returns to the pier.

The employee whose wage claim led to Tidewater's intervention in this action was a deck engineer on a crew boat. The parties agree that the employee is a seaman exempted from the FLSA's overtime provisions under 29 U.S.C. § 213(b)(6). Typically, Tidewater crew boat crews work 7 day hitches alternating with 7 day rest periods onshore; employees work 12 hour shifts alternating with 12 hour rest periods. The specific terms of most Tidewater crew members' work are set out in employment contracts negotiated between individual employees and Tidewater.

The record indicates that all the Clean Seas employees and the Tidewater employee are California residents who live in California when not on board ship. The workers are hired in California, receive paychecks at California addresses, and pay California taxes.

In 1987, the twelve Clean Seas employees filed claims for unpaid overtime compensation with the California Labor Commissioner. The California Labor Code grants the Labor Commissioner authority to enforce Wage Orders issued by the California Industrial Welfare Commission ("IWC"). *See* Cal. Lab. Code §§ 98, 1173. IWC Wage Order 4-80 sets out wage and overtime requirements with respect to "professional, technical, clerical, mechanical, and similar occupations." Cal. Code Regs. § 11345(2)(c). After a hearing, Aubry applied Wage Order 4-80 to the Clean Seas crewmembers and granted an average of $45,000 in back wages to each of the 12 Clean Seas employees. PMSA then filed the complaint for declaratory and injunctive relief underlying this appeal. Meanwhile,

in February 1988, Frank Kleman, the Tidewater employee, filed a claim for $50,000 unpaid over-time compensation (for a 12-month period) with the California Labor Commission. Tidewater then intervened in PMSA's federal court action. Kleman's case and all other similar administrative claims were stayed pending the outcome of the federal court action.

After a hearing on cross-motions for summary judgment, the district court granted PMSA and Tidewaters' request for declaratory and injunctive relief, holding that California cannot apply its overtime provisions to maritime employees employed primarily on the high seas or to seamen. 709 F. Supp. at 1526. The district court enjoined all enforcement of California's overtime pay provisions against employers of these maritime workers.

Aubry filed a timely notice of appeal.

JURISDICTION AND SCOPE OF RELIEF

Because PMSA and Tidewaters' complaints sought to enjoin enforcement of California law based on federal preemption, this case "arose under" federal law, and the district court properly exercised jurisdiction over PMSA's action for injunctive relief. *See Southern Pac. Transp. Co. v. Public Utils. Comm'n of State of Cal.,* 716 F.2d 1285, 1288-89 (9th Cir. 1983), *cert. denied,* 466 U.S. 936 (1984); *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 96 n.14 (1983).

Actions for declaratory and injunctive relief, however, must be carefully limited in scope to meet the "case and controversy" requirements of Article III of the Constitution. *O'Shea v. Littleton,* 414 U.S 488, 493-95 (1974); *Maryland Casualty Co. v. Pac. Coal and Oil Co.,* 312 U.S. 270, 273 (1941). Before the district court, PMSA, Tide-

water, and Aubry argued at length over the precise scope of the declaratory and injunctive relief action. PMSA and Tidewater sought a ruling on all employees of its members with respect to a broad range of California labor code provisions. 709 F. Supp. at 1522-23. Aubry, on the other hand, sought to limit the scope of the action to only those employees to which he had applied California's overtime provision. *Id.*

Applying the constitutional rule that "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," *Babbit v. United Farm Workers Nat'l Union,* 442 U.S 289, 298 (1979), the district court limited the scope of relief to cover only application of California's overtime pay laws to (1) FLSA-exempt seamen, whether working within the territorial zone or on the high seas; and (2) maritime employees working primarily on vessels on the high seas that are not engaged in foreign, intercoastal, or coastwise voyages. 709 F. Supp. at 1522-23,-1526.[5] The district court expressly stated that

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[5]There is some ambiguity in the record and in the district court's opinion about whether the relief granted also covered maritime employees working primarily on vessels on the high seas that are engaged in *coastwise* voyages. The district court cited the deposition testimony of a California Division of Labor Standards Enforcement official that suggested that Aubry intended to apply California overtime wage laws to non-inhabitant maritime employees. The court apparently concluded that the commissioner might possibly apply California law to employees who voyage from California to other states, 709 F. Supp. at 1255, and that the threat of enforcement of California wage laws against employers engaged in coastwise voyages was sufficient to present a justiciable controversy under Article III of the Constitution as to those employers. On the other hand, the overall thrust of the district court's analysis strongly suggests that the discussion was limited to employees, like those who brought claims in the underlying state administrative action, who work only on vessels

its decision did not affect the rights of non-FLSA exempt maritime employees working within California's territorial waters. 709 F. Supp. at 1523 n.7.[6] We conclude that, within these limits, the scope of the declaratory relief met the Constitution's case and controversy requirements. *See Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. at 298-305.

STANDARD OF REVIEW

We review a grant of summary judgment de novo. *Kruso v. International Tel. & Tel. Corp.,* 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied,* 110 S. Ct. 3217 (1990).

DISCUSSION

This appeal turns on one core issue: Does federal law preempt California from applying its overtime pay laws to

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off the California coast that do not engage in foreign, intercoastal, or coastwise voyages. *See* 709 F. Supp. 1519, 1523-25. This ambiguity may be due to the fact that the employees involved in this action work on coastwise *vessels, see* 46 C.F.R § 70.10-13 (1988) (defining "coastwise vessels" as vessels "normally navigating the waters . . . 20 nautical miles or less offshore"), but were *not* in fact engaged in coastwise *voyages, see* 709 F. Supp. at 1524. We resolve any arguable ambiguity over the scope of the relief granted by the district court by limiting the scope of our opinion to those employees described and discussed by the district court, i.e., maritime employees who work off the California coast on vessels that do not engage in foreign, intercoastal, or coastwise voyages. We do not address the question whether Aubrey is preempted by federal law from applying California's overtime pay laws to maritime employees employed primarily on the high seas on *coastwise* vessels engaged in *coastwise* voyages.

[6]PMSA agrees in its brief to this court that Aubry "is currently free to apply California's overtime laws to non-FLSA-exempt, general maritime law seamen [i.e., maritime employees] with respect to work that takes place primarily within California's territorial waters."

seamen working on territorial waters and on the high seas off the California coast and to maritime employees working primarily on the high seas off the California coast, when the vessels on which the employees work do not engage in foreign, intercoastal, or coastwise voyages? For the reasons stated below, we hold that it does not.

PMSA and Tidewater contend that California's overtime pay laws are preempted by two federal statutes—the Shipping Act and the FLSA—and by general admiralty law. To decide whether a federal statute preempts state law, "our sole task is to ascertain the intent of Congress." *California Fed. Sav. & Loan Ass'n v. Guerra,* 479 U.S. 272, 280 (1987). Federal law preempts state law if (1) Congress expressly so states, (2) Congress enacts comprehensive laws that leave no room for additional state regulation, or (3) state law actually conflicts with federal law. *Id.* at 280-81: *see Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 248 (1984); *Chevron U.S.A., Inc. v. Hammond,* 726 F.2d 483, 486 (9th Cir. 1984), *cert. denied,* 471 U.S. 1140 (1985).

States, however, possess broad authority under their police powers to regulate the employment relationship to protect resident workers. *De Canas v. Bica,* 424,U.S. 351, 356 (1976). Thus, in addressing the preemption question before us, " 'we start with the assumption that the historic powers of the States were not to be superseded by [federal legislation] unless that was the *clear and manifest* purpose of Congress.' " *Chevron U.S.A., Inc. v. Hammond,* 726 F.2d at 488 (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)) (emphasis added in *Hammond*).

I. The Shipping Act

PMSA and Tidewater assert that Congress preempted Aubry's actions in this case by extensively regulating maritime employment through the Shipping Act. The district court rejected this contention and held that Aubry's enforcement of California's overtime provisions to maritime employees on the high seas and seamen is not preempted by statutory maritime law. *See* 709 F. Supp. 1523-24. According to the district court, "[m]aritime statutes simply do not purport to govern the overtime wages of employees such as those in this action." 709 F. Supp. at 1524. We agree with the district court's conclusion that the Shipping Act does not preempt California overtime pay laws with respect to the seamen and maritime employees at issue in this case.

The Shipping Act does govern some maritime employees' wages, hours, and working conditions. *See* 46 U.S.C. §§ 10301-10908. As the district court noted, however, these provisions *do not apply* to the employees involved in this appeal, because they cover only vessels engaged in foreign, intercoastal, or coastwise voyages. *Id.*[7] Further, while all maritime employees are covered by certain provisions relating to "protection and relief," e.g., accommodations on ship, 46 U.S.C. § 11101, medical care for maritime workers, 46 U.S.C. § 11102, and limitations on attachment of wages, 46 U.S.C. § 11109, these provisions in no way regulate overtime pay.

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[7]The district court found: "The crewmembers whose claims precipitated this action were not on 'voyages' that fall under any of these three categories. Their vessels either stayed on the high seas surrounding the oil rigs or 'voyaged' between one port and the oil rigs." 709 F. Supp. at 1519.

PMSA and Tidewater both argue, however, that to apply California's overtime pay laws to maritime employees and seamen conflicts with 46 U.S.C. § 8104, which sets "manning requirements" — including maximum hours and minimum "watches" — for maritime workers.[8] Under 46 U.S.C. § 8104(b),

> [o]n an oceangoing or coastwise vessel of not more than 100 gross tons (except a fishing, fish processing, or fish tender vessel), a licensed individual may not be required to work more than 9 of 24 hours when in port, including the date of arrival, or more than 12 of 24 hours at sea, except in an emergency when life or property are [sic] endangered.

Maritime employers who violate this section are subject to civil penalties. 46 U.S.C. § 8104(i), (j). PMSA and Tidewater contend that California's overtime pay laws, which require overtime pay for hours worked in excess of eight hours per day, conflict with this federal statutory provision by creating a maximum below the 12 hour maximum established in section 8104(b).

We reject this contention. We addressed a similar argument in *Agsalud v. Pony Express Courier Corp. of Am.*, 833 F.2d 809 (9th Cir. 1987) *("Agsalud")*. In that case, a motor carrier contended that the state of Hawaii's overtime pay law was preempted by the federal Motor Carrier Act, 49 U.S.C. §§ 3101-3104. Regulations issued under the Motor Carrier Act generally provided for a maximum work week of 60 hours, while the Hawaii statute required overtime pay for work in excess of 40 hours per week. *Id.* at 810. We held that, absent a showing that the

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[8]Section 8104 is not limited to vessels engaged in foreign, intercoastal, or coastwise voyages, and, therefore, applies to the employees at issue in this case. *See* 46 U.S.C. § 8101-8105.

state law had the effect of establishing a firm maximum on hours worked different from the maximum set by federal law, Hawaii's overtime pay provisions did not conflict with federal law, and were not preempted. *Id.* We explained that "[o]ne need not be an economist to realize that some employers may continue to provide more than 40 hours of work even though an overtime premium is required, because paying the premium may be cheaper than the alternatives of not providing service to customers or hiring new help." *Id.*

Our reasoning in *Agsalud* applies with equal force here. PMSA and Tidewater have made no showing that the effect of Aubry's enforcement action will be to set a firm maximum different from that set in 46 U.S.C. § 8104. The argument that California's overtime pay law conflicts with section 8104 of the Shipping Act and is preempted, therefore, fails.

While the Shipping Act does comprehensively regulate maritime activities, it does not regulate overtime pay for the workers involved in this case. The Shipping Act does not preempt California from applying its overtime pay laws to the seamen and maritime employees involved in this action.

II. The FLSA

After rejecting PMSA and Tidewaters' Shipping Act preemption argument, the district court held that the FLSA preempted California overtime pay laws with respect to the employees at issue in this case. The district court concluded that, with respect to FLSA-exempt seamen, Congress' decision to exclude seamen from the federal act's overtime provisions evinced its intent to preempt all state overtime laws as to those employees, whether on territorial waters or on the high seas. 709

F.Supp. at 1525. The district court further held that, with respect to general maritime employees, California overtime provisions conflict with the FLSA, and that the FLSA's savings clause[9] cannot save state laws regulating workers on vessels "primarily situated on the high seas." 709 F.Supp. at 1524-25.

A. Exemption of Seamen from the FLSA

We address first the question whether, by exempting seamen from federal overtime coverage under 29 U.S.C. 213(b)(6), Congress preempted California's overtime laws with respect to seamen. We hold that section 213(b)(6) does not preempt California from applying the state's overtime pay laws to FLSA-exempt seamen working off the California coast.

The Seamen involved in this case work both on California's territorial waters and on the high seas.[10] The district court held that the FLSA preempts California's overtime provisions as applied to seamen on the high seas *and* on territorial waters, reasoning that, because seamen are exempt from federal overtime provisions under the FLSA, 29 U.S.C. § 213(b)(6), "Congress has spoken directly on the issue of overtime pay for seamen." 709 F.Supp. at 1525. This holding raises an important issue regarding the effect of a specific exemption of a category of maritime workers — seamen — from coverage under federal law, i.e., should the specific legislative provision

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[9]Under 29 U.S.C. § 218(a), no provision of the FLSA preempts another federal, state, or municipal law from "establishing a minimum wage higher than the minimum wage established under [the FLSA] or a maximum workweek lower than the maximum workweek established under [the FLSA]."

[10]As noted above, "seamen" as used by the district court is defined more narrowly than "maritime employee."

exempting seamen from the FLSA's overtime compensation standards be read broadly to indicate congressional intent to preclude states from regulating the subject of seamen's overtime compensation?

No Ninth Circuit case squarely addresses this issue. We turn, then, to an examination of the language and legislative history of the FLSA.

When Congress originally enacted the FLSA of 1938, it exempted seamen from coverage under the act's minimum wage and overtime provisions. In 1961, Congress brought seamen employed on American vessels under the FLSA's minimum wage provisions, but maintained their exemption from coverage under the act's overtime provisions. At no time has Congress expressly prohibited states from applying their overtime laws to seamen. Further, PMSA and Tidewater point to nothing in the legislative history of § 213(b)(6) — either in the 1938 act or in the 1961 amendments to the FLSA — that suggests that Congress intended to preclude application of state overtime provisions to seamen. Our review of the legislative history has revealed no such congressional intent.[11]

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[11] *See Joint Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Education and Labor and the House Comm. on Labor,* 75th Cong., 1st Sess. 544-549, 1216-17 (1937); 82 Cong. Rec. 1784 (1937); 82 Cong. Rec. 7875 (1937). *See also Hearings on Various Bills Regarding Minimum Wage Legislation Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor,* 86th Cong., 2d Sess. 885-92, 895-96, 920-48, 1522-23 (1960); *Hearings on H.R. 3935 and Various Bills Regarding Minimum Wage Legislation Before the Special Subcomm. on Labor of the House Comm. on Education and Labor,* 87th Cong., 1st Sess. 63-64, 83, 379-80, 597-99 (1961); *Hearings on S. 256, S. 879, S. 895 and Bills Amending the Fair Labor Standards Act Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 87th Cong., 1st Sess. 15, 41, 376-93, 558,

The legislative history of the FLSA does show that Congress considered the special circumstances of maritime and other types of labor when it exempted seamen and other employees from the FLSA's overtime and minimum wage provisions. Federal Amicus argues, however, and we agree, that in exempting seamen from coverage under the 1938 act's overtime and minimum wage provisions, Congress intended to prevent overlapping regulation of wage and hour conditions of seamen by different federal agencies. *See Joint Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Education and Labor and the House Comm. on Labor,* 75th Cong., 1st Sess. 546-49, 1216-17 (1937); 82 Cong. Rec. 1784-85, 7875 (1937); *see also* 29 C.F.R. § 783.29 (1989) (discussing legislative history of exemption).[12] Further, the extensive legislative history of the 1961 amendments to the FLSA makes clear Congress' determination that federal minimum wage levels for seamen were necessary, but discloses nothing indicating that, by leaving the exemption of

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682-83 (1961); H.R. Rep. No. 75, 87th Cong., 1st Sess. 13-14, 31 (1961); S. Rep. No. 145, 87th Cong., 1st Sess. 103 (1961).

[12]Under the FLSA of 1938 as proposed, all wage and hour claims were to be handled by a new Labor Standards Board. At the time Congress was considering the proposed legislation, however, maritime employees' wage and hour claims were handled by the Maritime Commission under the Merchant Marine Act of 1936. *See Joint Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Education and Labor and the House Comm. on Labor,* 75th Cong., 1st Sess. 1216-17. At least one witness testifying on behalf of organized labor supported the exemption of seamen from the FLSA's overtime and minimum wage provisions on the ground that overlapping federal agency jurisdiction over seamen's wage and hour claims could threaten gains already achieved by organized maritime labor before the Maritime Commission. *See id.* at 544-49 (testimony of Ralph Emerson, Legislative Representative, National Maritime Union of America).

seamen from the FLSA's overtime provisions in place, Congress intended to preclude states from applying overtime pay provisions to FLSA-exempt seamen.[13]

Related case authority supports the conclusion that, absent clear congressional intent to the contrary, the exemption of seamen from the FLSA's overtime provisions does not, per se, preempt California from applying its overtime pay laws to seamen. In *Agsalud,* for example, we held that the exemption of truck drivers engaged in interstate transportation of goods from the FLSA's overtime provisions did not preempt state overtime laws as to those workers. 833 F.2d at 810. In reaching that conclusion, we expressly adopted the reasoning of *Pettis Moving Co., Inc. v. Roberts,* 784 F.2d 439 (2d Cir. 1986) ("*Pettis Moving Co.*"), and *Williams v. W.M.A. Transit Co.,* 472 F.2d 1258 (D.C. Cir. 1972) ("*Williams*"), two cases involving the question whether exemption of certain employees from the FLSA's wage provisions, per se, preempts state law with respect to those employees. *See Agsalud,* 833 F.2d at 810.

In *Pettis Moving Co.,* a New York motor carrier argued that, because Congress exempted employees of interstate motor carriers from coverage under the FLSA's overtime

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[13] *See Hearings on Various Bills Regarding Minimum Wage Legislation Before the Subcomm. on Labor Standards of the House Comm. of Education and Labor,* 86th Cong., 2d Sess. 885-92, 895-96, 920-48, 1522-23 (1960); *Hearings on H.R. 3935 and Various Bills Regarding Minimum Wage Legislation Before the Special Subcomm. on Labor of the House Comm. on Education and Labor,* 87th Cong., 1st Sess. 63-64, 83, 379-80, 597-99 (1961); *Hearings on S. 256, S. 879, S. 895 and Bills Amending the Fair Labor Standards Act Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 87th Cong., 1st Sess. 15, 41, 376-93, 558, 682-83 (1961); H.R. Rep. No. 75, 87th Cong., 1st Sess. 13-14, 31 (1961); S. Rep. No. 145, 87th Cong., 1st Sess. 103 (1961).

provisions, New York could not apply its overtime pay laws to those employees. The Second Circuit first emphasized that "[t]raditional powers of the states . . . are not superseded by federal acts unless that was the clear and manifest purpose of Congress." 784 F.2d at 441 (*citing Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 157 (1978)). The court then noted that the FLSA's savings clause "explicitly permits states to set more stringent overtime provisions than the FLSA," and held that "Congress did not prevent the states from regulating overtime wages paid to workers exempt from the FLSA." *Id.* at 441.

In *Williams,* the D.C. Circuit addressed the question whether the District of Columbia's minimum wage laws could be applied to bus drivers who were employed by interstate motor carriers and, therefore, were exempted from the FLSA's minimum wage provisions. That court also relied on the FLSA's savings clause in finding no preemption: "This section expressly contemplates that workers covered by state law as well as FLSA shall have any additional benefits provided by the state law — higher minimum wages; or lower maximum workweek. By necessary implication it permits state laws to operate even as to workers exempt from FLSA." 472 F.2d 1261.

Finally, at least one district court in our circuit has held that Congress' exemption of certain maritime employees from coverage under a maritime wage statute did not preempt a state from regulating those employees' wages. In *Sewell v. M/V Point Barrow,* 556 F. Supp. 168 (D. Alaska 1983) (Fitzgerald, D.J.), workers employed on vessels engaged in offshore test drilling off the Alaska coast filed an action to recover unpaid wages and for penalties under state and federal law. After holding the employees were exempted from coverage under the fed-

eral statute,[14] the court reached the employer's contention that "the exemption of coastwise vessels from the [federal] penalty provisions . . . demonstrate[d] a congressional intent that seamen employed on coastwise vessels not receive delayed wage payment penalties." *Id.* at 169. The court rejected this argument based on its conclusion that Congress did not intend, by exempting coastwise seamen, to preempt state wage penalty laws, but rather intended that coastwise seamen would be treated like other workers under state law. *Id.* at 170.

Based on these authorities and on general principles of federal preemption, we hold that, in light of the plain language of the FLSA's savings clause and in the absence of a clear indication from Congress to the contrary, § 213(b)(6) does not preclude enforcement of California's overtime provisions to protect the California-resident seamen in this case. The district court erred by holding that section 213(b)(6) preempts California overtime pay laws with respect to FLSA-exempt seamen on the high seas and within the territorial zone off the California coast.

B. Non-FLSA-Exempt Maritime Employees on the High Seas

We next address the question whether the FLSA preempts California from applying the state's overtime

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[14]The employees sought penalties for failure to pay wages under 46 U.S.C. § 596, which provides that an employer who fails to pay wages shall pay a penalty equal to two days' wages for each unpaid day. Under 46 U.S.C. § 544, however, employees on "coastwise" voyages are exempted from 46 U.S.C. § 596. The district court in *Sewell v. M/V Point Barrow* held that the employees who brought the action were employed on vessels engaged in coastwise trade and were exempt from coverage under 46 U.S.C. § 596.

pay laws to maritime workers, not exempt from the FLSA, who work on vessels situated primarily on the high seas off the California coast.

The parties agree that California's overtime pay laws and the FLSA overtime provisions that cover non-exempt maritime employees conflict, and that California's provisions are more generous than the FLSA.[15] The key issue is whether the FLSA's savings clause allows California to apply its more generous overtime laws to the maritime workers involved in this case. The savings clause provides in relevant part:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage estab-

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[15]According to the district court, "the California overtime provisions and the FLSA provisions produce widely differing results." 709 F. Supp. at 1524. The most important differences between California's overtime pay provisions and the FLSA are as follows: under California law, overtime at one and one-half times an employee's regular rate must be paid after eight hours work per day, 8 Cal. Code Regs. § 11040.3(A)(1), while under the FLSA, overtime must be paid after 40 hours work per week, 29 U.S.C. § 207(a); 29 C.F.R. § 778.101; under California law, all hours in excess of 12 per day must be paid at double time, 8 Cal. Code Regs. § 11040.3(A)(2), while the FLSA contains no such provision; under California law, "hours worked" is defined broadly, to include "the time during which an employee is subject to the control of an employer," 8 Cal. Code Regs. § 11040.2(H), while under the FLSA "hours worked" as applied to seamen includes only hours when the employee is "actually on duty," 29 U.S.C. § 206(a)(4); and under California law, payments to employees on a "fluctuating workweek" basis — i.e., by fixed salary that reflects average hours worked — are not permitted, *Skyline Homes, Inc. v. Dept. of Indus. Relations*, 165 Cal. App. 3d 239, 211 Cal. Rptr. 792 (1985), while under the FLSA, such payments are allowed in certain limited circumstances, 29 C.F.R. § 778.114.

> lished under this chapter or a maximum workweek lower than the maximum workweek established under this chapter . . . .

29 U.S.C. § 218(a).

Aubry and federal amicus contend that the savings clause signals Congress' intent that the wage and hour standards set in the FLSA are a floor, and that states are free to establish wage and hour levels higher or more generous than the FLSA standards. They further argue that Congress, in enacting the FLSA, evinced no intent to preclude maritime workers' benefiting from the savings clause. The district court rejected this argument, based on its conclusion that principles of federal admiralty law require that the FLSA's savings clause be construed restrictively in this case. The district court reasoned:

> [T]he FLSA's savings clause cannot properly be construed to save state laws that seek to regulate the employment of maritime employees whose work situs is a vessel normally situated on the high seas. This is so because Congress may not constitutionally delegate its maritime jurisdiction to the states. Such a delegation would destroy the harmony and uniformity of admiralty law established by the Constitution. Thus, under compulsion of the Constitution, the savings clause must be interpreted as not applying to maritime employees employed primarily on the high seas.

709 F. Supp. at 1524-25 (citations omitted). According to the district court, while this restrictive interpretation of the savings clause "lacks direct precedential support," common sense demanded it. *Id.* at 1525.

For the reasons stated below, we hold that the district court erred. Neither the FLSA, by its terms, nor general

admiralty law preempts California from applying the state's overtime pay laws to non-exempt maritime workers at issue in this case.

1. *Jensen* and its Progeny

The district court based its restrictive reading of section 218 on a long line of cases, beginning early in this century, in which courts limited states' power to regulate maritime activities on the ground that the United States Constitution requires uniformity in admiralty law. Article III, Section 2 of the Constitution provides in part that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." The Supreme Court has held that this provision, by implication, grants Congress the power to revise and supplement the maritime law, and grants federal courts power to develop the general maritime law. *See Romero v. International Terminal Operating Co.,* 358 U.S. 354, 360-61 (1959).

In *Southern Pac. Co. v. Jensen,* 244 U.S. 205, 216 (1917) ("*Jensen*"), the Supreme Court restricted states' authority in maritime matters based on this constitutional grant of authority to the federal government. Under the so-called *Jensen* doctrine, no state legislation concerning navigation is valid

> if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.

This

> limitation, at the least, is essential to the effective operation of the fundamental purposes for which [the maritime] law was incorporated into our national laws by the Constitution itself.

Jensen, 244 U.S. at 216. This rule was extended in *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920) ("*Knickerbocker Ice*"), where the Supreme Court struck down an act of Congress that directly granted states authority to apply state workers compensation laws to maritime employers. The Court stated that the delegation was "beyond the power of Congress." *Id.* at 164.

Here, the district court reasoned that the constitutional considerations underlying *Jensen* and *Knickerbocker Ice* foreclosed straightforward application of the FLSA's savings clause *to a specific category of workers — maritime employees employed primarily on the high seas.* According to the district court, allowing the FLSA's savings clause to permit California's actions in this case would effect a *delegation* of maritime authority, invalid under *Knickerbocker Ice,* and would otherwise be invalid as destructive of harmony in federal admiralty law.

We disagree with the district court's holding that section 218, if construed to allow Aubry's actions with respect to maritime employees on the high seas, would in effect be a *delegation* of congressional maritime powers to the state. California's actions in this case represent an exercise of traditional police powers firmly in place *before* Congress enacted the FLSA. *See West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 393 (1937) ("In dealing with the relation of employer and employed, the [state] has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace

and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression."). Thus Congress did not "delegate" authority to the states through section 218, but simply made clear its intent not to disturb the traditional exercise of the states' police powers with respect to wages and hours more generous than the federal standards. We cannot read section 218 as a delegation, and, therefore, conclude that *Knickerbocker Ice* does not control this case.

This conclusion, however, does not settle the issue before us. General principles of admiralty law still limit states' authority to regulate maritime activities. We must determine whether, under *Jensen* and its progeny, those principles require a restrictive reading of section 218 in this case.

"The *Jensen* doctrine, though easily stated, is not easily applied." 1 Friedell, *Benedict on Admiralty,* § 112, at 7-36 (7th ed. 1987).[16] The Supreme Court long ago rejected a rigid per se rule that all state regulation of maritime activities is constitutionally invalid. In *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 338 (1973), for example, a unanimous court explained that *Jensen* and *Knickerbocker* have been "limited by subsequent holdings of [the] Court." In *Romero v. Int'l Terminal Operating Co.,* 358 U.S. at 373, the Court explained that *Jensen's* limitation on state authority "still leaves the States a wide scope." *See also Just v. Chambers,* 312 U.S. 383, 388

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[16] *See generally* 1 Friedell, *Benedict on Admiralty,* §§ 11-114, at 7-31 to 7-72 (reviewing doctrine limiting power of states to independently regulate maritime matters); Gilmore and Black, *The Law of Admiralty* 49-50 (same); D. Robertson, *Admiralty and Federalism* 200 (1970) (same); Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* S. Ct. Rev. 158 (1960) (same).

(1941) (state may modify or supplement maritime law); *Maryland Casualty Co. v. Cushing,* 347 U.S. 409, 429 (Black, J., dissenting) (except in limited circumstances, "states are free to make laws relating to maritime affairs").

Yet the Court has demonstrated the continuing force of *Jensen.* In *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207 (1986) ("*Tallentire*"), the Court held that the federal admiralty law — specifically, the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-768 — preempted Louisiana's wrongful death statute, notwithstanding a DOHSA savings clause that provided that "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected" by the DOHSA. The Court cited *Jensen* for the proposition that " '[n]o [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress.' " *Id.* at 298 (quoting *Jensen,* 244 U.S. at 216); *see also Askew v. American Waterways Operators, Inc.,* 411 U.S. at 344 (acknowledging that *Jensen* "has vitality left").

Our review of relevant case authority leads us to conclude that the general rule on preemption in admiralty is that states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not *actually conflict* with federal law or *interfere* with the *uniform working* of the maritime legal system.[17] The

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[17] *See* 1 Friedell, *Benedict on Admiralty* § 112, at 7-36; Gilmore and Black, *The Law of Admiralty* 50 (2d ed. 1975); Tribe, *American Constitutional Law* 304 (2d ed. 1988). There is ample support for this rule in our circuit. *See Chevron U.S.A., Inc. v. Hammond,* 726 F.2d 483, 496 (9th Cir. 1984), *cert denied,* 471 U.S. 1140 (1985) (state law should be preempted only to the extent necessary to protect the achievement of the aims of the federal act in question); *Wasyl, Inc. v. First Boston Corp., Inc.,* 813 F.2d 1579, 1582 (9th Cir. 1987) (same);

questions, then, are (1) whether applying California's overtime provisions to maritime employees on the high seas contravenes an act of Congress, and (2) whether applying the provisions would unduly disrupt uniformity in maritime law.

2. Does California's Overtime Pay Law Contravene an Act of Congress?

The district court found, and we agree, that the maritime employees "fall in the interstices between express federal maritime statutes." 709 F. Supp. at 1525. Maritime statutes do not apply to maritime employees, like these, who are not on vessels making foreign, intercoastal, or coastwise voyages. In addition, Congress has specifically allowed states to enforce overtime laws more generous than the FLSA, 29 U.S.C. § 218(a), and we find no indication that Congress intended that maritime employees not benefit from more generous state wage and hour laws. California's attempt to supplement federal law in this case does not present an irreconcilable conflict with the statutory maritime law or with the FLSA; it does not "contravene the essential purpose expressed by an act of Congress." *Cf. Tallentire,* 477 U.S. at 298; *Jensen,* 244 U.S. at 216.

Bergen v. F/V St. Patrick, 816 F.2d 1345, 1348-49 (9th Cir. 1987) (" 'there is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted' ") (quoting *Mobile Oil Corp. v. Higginbotham,* 436 U.S. 618, 624-25 (1978)); *Sewel v. M/V Point Barrow,* 556 F. Supp. 168, 169 (D. Alaska 1983) ("admiralty courts may recognize and enforce rights and obligations created by state law"). Other circuits' cases also support the rule. *See Carey v. Bahama Cruise Lines,* 864 F.2d 201, 207 (1st Cir. 1988); *Exxon Corp. v. Chick Kam Choo,* 817 F.2d 307, 317-18 (5th Cir. 1987), *rev'd on other grounds,* ___ U.S. ___, 108 S. Ct. 1684 (1988); *Steelmet, Inc. v. Caribe Towing Corp.,* 779 F.2d 1485, 1488 (11th Cir. 1986).

This case, therefore, differs significantly from two recent Supreme Court decisions the district court relied on in narrowly construing section 218 of the FLSA: *Oil, Chem., & Atomic Workers, Int'l Union, AFL-CIO v. Mobil Oil Corp.*, 426 U.S. 407 (1976) ("*Mobil Oil*"), and *Tallentire*. *Mobil Oil Corp.* and *Tallentire* both involved interpretation of savings clauses in federal statutes, and the Court construed the savings clauses narrowly in each case. *Mobil Oil* and *Tallentire*, however, do not require a restrictive interpretation of section 218 of the FLSA in this case.

The issue in *Mobil Oil* was whether Texas could apply its "right-to-work" laws to workers employed on oil tankers on the high seas off the Texas coast. Like the present case, *Mobil Oil* required interpretation of a savings clause — federal labor statutes expressly allow so-called union "agency shop" agreements,[18] 29 U.S.C. § 158(a)(3), but also allow states to prohibit such agreements through "right-to-work" laws, 29 U.S.C. § 164(b). The Court, as a matter of statutory interpretation, held that the savings clause at issue could not be read to allow Texas to apply its right-to-work laws to maritime employees who worked on the high seas outside of the state's territorial waters. In so holding, however, the Court relied on clear legislative history expressing congressional intent to restrict the savings clause's reach. Congress, the Court concluded, "viewed [the savings clause] as allowing a State to ban [agency shop] agreements calling for work to be performed *within the State*." 426 U.S. at 418 (emphasis

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[18] "An 'agency shop' agreement generally provides that while employees do not have to join the union, they are required . . . to pay the union a sum equal to the union initiation fee and are obligated as well to make periodic payments to the union equal to the union dues." *Mobil Oil*, 426 U.S. at 409 n.1.

added). Further, the Court noted that the purpose and effect of Texas right-to-work law directly conflicted with the federal statute. *Id.* at 417.

In *Tallentire,* the Court held that a DOHSA savings clause that allowed wrongful death actions in state courts for deaths on the high seas did not allow states to apply their *substantive* state wrongful death laws to deaths on the high seas, but instead only preserved state court *jurisdiction* to hear wrongful death actions under the DOHSA. 477 U.S. at 220-32. As in *Mobil Corp.,* the Court based its restrictive interpretation of the savings clause at issue on the language, purpose, and legislative history of the federal statute.[19] And again, the Court noted the clear conflict between the state law and federal statute: "No reasonable doubt could be entertained of the displacement of state remedies for deaths occurring on the high seas because the conflicting federal standard was not derived just from general federal maritime law; it was explicitly provided for by federal legislation directly on point." *Id.* at 228. Further, the Court noted that an express purpose of Congress in enacting the DOHSA was to achieve uniformity in wrongful death actions for deaths on the high seas. *Id.* at 230-31.

In contrast to the savings clauses at issue in *Mobil Oil* and *Tallentire,* we find no indication in the language or legislative history of the FLSA's savings clause that Congress intended that section 218 not allow states to apply more generous overtime pay laws to maritime work-

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[19]That history revealed strong expressions by bill supporters that federal law would apply exclusively to actions for deaths on the high seas. *See Tallentire,* 477 U.S. at 223-30. *See also* Gray, *Applicability of State Wrongful Death Statutes on the High Seas,* 18 J. Mar. L. & Com. 67, 81-88 (1987) (discussing *Tallentire* and legislative history of DOHSA savings clause).

ers working on the high seas. In addition, California's more protective overtime provisions are compatible with, rather than conflict with, the federal statute. Compatible state law may supplement federal admiralty law. *See Chevron U.S.A., Inc. v. Hammond*, 726 F.2d at 495-501 (finding no conflict between federal maritime statute and more stringent state maritime law provisions); *Sewell v. M/V Point Barrow*, 556 F. Supp. at 170-71 (same). Neither *Mobil Oil* nor *Tallentire* requires preemption in this case.[20]

3. Does California's Overtime Pay Law Unduly Disrupt Uniformity in Admiralty Law?

The district court based its holding in part on the "common sense" notion that "the uniformity of federal admiralty law would be destroyed if the states were permitted to 'add on' to the federal law enacted by Congress." 709 F. Supp. at 1525. Likewise, PMSA and Tidewater argue on appeal that allowing states to enforce their overtime provisions against maritime employers would produce a "crazy-quilt pattern of regulation."

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[20]Cases in our circuit relied on by PMSA and Tidewater are also distinguishable on the ground that the state laws invalidated as preempted by federal law in those cases were in direct conflict with federal admiralty law. *See Evich v. Morris*, 819 F.2d 256, 257-58 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987) (state survival action preempted by conflicting federal maritime survival law); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1348-49 (9th Cir. 1987) (state punitive damages remedy in wrongful death action preempted by DOHSA, which disallows punitive damages remedy); *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980) (state wrongful death action preempted by conflicting federal maritime wrongful death law); *Daughtry v. Diamond M Co.*, 693 F. Supp. 856, 861-63 (C.D. Cal. 1988) (state procedural rules on effect of settlement on joint tortfeasors' duty to contribute preempted by conflicting federal procedural rules).

The Constitution tolerates some disharmony in admiralty law. As discussed above, states may supplement admiralty law, and states' supplementation of admiralty law necessarily creates some discord in that law.[21] Nevertheless, *Mobil Oil, Tallentire*, and *Jensen* and its progeny make clear that the interest in uniformity in admiralty law must be considered in determining the validity of state regulation of maritime activities. Our circuit has also acknowledged the importance of uniformity in admiralty law. *See, e.g., Evich v. Morris*, 819 F.2d 256, 257-58 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987); *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980). We are left, therefore, with the difficult question whether applying California's overtime provisions to maritime employees who work on vessels on the high seas that do not engage in foreign, intercoastal, or coastwise voyages *unduly disrupts* harmony in the federal admiralty system, so as to render unconstitutional Aubry's actions. We hold that it does not.

Whether Aubry's application of California's overtime provisions unduly disrupts federal maritime harmony in violation of the Constitution depends on the balance of federal and state interests involved in application of the overtime provisions. *See Kossick v. United Fruit Co.*, 365 U.S. 731, 741-42 (1961); *East River S. S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864 n.2 (1986); *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 317 (5th Cir. 1987), *rev'd on other grounds*, 108 S. Ct. 1684 (1988);

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[21] "All state laws, if given effect in admiralty cases, interfere to a degree with the uniformity of admiralty law." Friedell, 1 *Benedict on Admiralty* § 12, at 7-36; *see also Romero v. International Terminal Operating Co.*, 358 U.S. at 374 ("Maritime law is not a monistic system.").

Steelmet, Inc. v. Caribe Towing Corp., 779 F.2d 1485, 1488 (11th Cir. 1986).

We conclude that the balance tips in favor of California in this case. Under California law, the Labor Commission is charged with enforcing state wage provisions to ensure the health, safety, and welfare of resident employees. Cal. Labor Code § 1173. Here Aubry has attempted to provide additional protection to employees involved in work of critical importance to the state — containment and clean-up of marine oil spills. In addition, the record indicates that the maritime employees involved in this case are California residents, were interviewed and hired in California, and pay California taxes. Their contacts with the state are quite close: the vessels involved in this case do not make coastwise, intercoastal, or foreign voyages; *Mr. Clean II* is moored in a California harbor 90 percent of the time and works exclusively on oil rigs off the California coast; and *Mr. Clean III* is stationed exclusively off the California coast and visits only California ports.

PMSA and Tidewater contend, however, that California's interest in enforcing its overtime pay laws in this case are undercut by Aubry's failure to comply with state administrative and procedural requirements regarding wage and hour rulemaking and law enforcement. This argument is misplaced. We emphasize that we are *not* deciding here whether Aubry's actions are valid *as a matter of California administrative and labor law.* Our task is to determine only whether, in this case, federal law preempts California's overtime pay provisions. The state's interests in applying its overtime provisions here are plain. PMSA and Tidewaters' challenges to Aubry's action on state law grounds must be directed to the state's agencies and courts, and we assume here that the labor

commissioner's actions comply fully with state law and procedures.[22]

In contrast to the [sic] California's strong interests, Federal interests in precluding enforcement of California's overtime provisions in this case are relatively weak. There is no indication that Congress, in enacting the FLSA's savings clause, intended to preempt states from according more generous protection to maritime employees on the high seas off a state's coastal waters. Further, the purpose behind the FLSA is to establish a national *floor* under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA.

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[22]In some circumstances, comity requires that federal courts abstain from considering actions for declaratory and injunctive relief against state proceedings. *See Fresh Int'l Corp. v. Agricultural Labor Relations Bd.*, 805 F.2d 1353 (9th Cir. 1986); *Younger v. Harris*, 401 U.S. 37 (1971). According to the parties, however, no state court is currently considering the issues raised in this appeal. " '[T]he salient fact' in determining whether *Younger* abstention is appropriate 'is whether federal-court interference would unduly interfere with the legitimate activities of the state.' " *Sable Communications of Cal. v. Pacific Tel. & Tel.*, 890 F.2d 190 (9th Cir. 1989) (quoting *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 433 n.12 (1982)). Here, we address only the purely federal question of whether federal statutes and general admiralty law preempt California's overtime pay laws. We do not address any state law issues raised by Aubry's actions. Because there is no ongoing state adjudication of the claims here at issue, and because the state law challenges to Aubry's actions necessarily involve issues distinct from those federal issues now before us, concerns of comity underlying the *Younger* abstention doctrine are not present here. *See Id.; Fresh Int'l Corp. v. Agricultural Labor Relations Bd.*, 805 F.2d at 1358. The district court was not required to abstain.

Most important, because the maritime employees involved in this action are California residents who work on vessels that operate exclusively off the California coast, application of the state's overtime law will not disrupt international or interstate commerce. Uniformity in maritime law is required "only where the essential features of an exclusive federal jurisdiction are involved." 1 Friedell, *Benedict on Admiralty* § 111, at 7-32; *see Just v. Chambers*, 312 U.S. at 388. The minimal impact that Aubry's actions would have on international and interstate maritime commerce leads us to conclude that the "essential features" of exclusive federal jurisdiction are not unduly burdened in this case.[23]

We have focused in this section on the question whether, under general admiralty principles, California is preempted from applying the state's overtime pay laws to non-exempt maritime employees who work on vessels situated primarily on the high seas that do not engage in foreign, intercoastal, or coastwise voyages. But our analysis applies as well to FLSA-exempt seamen who work on such vessels. As we held above, allowing California to apply its overtime pay laws to seamen does not conflict with the FLSA; exemption from the FLSA's overtime provisions does not, per se, preempt state overtime laws. Also, the balance between state and federal interests is the same with respect to the seamen at issue in this case as it is with respect to nonexempt maritime workers. The

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[23]This further distinguishes the present case from *Mobil Oil*, in which the Court noted the practical difficulties of allowing application of the state law in that case. *See* 426 U.S. at 418-19. In *Mobil Oil*, of the workers to which Texas sought to apply its laws, over half were residents of other states; over one-third listed New York, rather than Texas, as their port; and all were on vessels that voyaged regularly from Texas to New York or Rhode Island and back. 426 U.S. at 411. The practical problems present in *Mobil* are not present in this case.

Tidewater employee involved in the underlying action is a California resident; he works, like other California-based Tidewater employees, exclusively in California ports and on the high seas off the California coast. Thus, as with the maritime workers, we hold that allowing Aubry to apply California's overtime pay laws to the seamen involved in this suit does not unduly disrupt federal admiralty law, and, for that reason, is not constitutionally invalid.

Our conclusion that Aubry may constitutionally apply California's overtime provisions to maritime employees and seamen who work on the high seas off the California coast on vessels that do not engage in foreign, intercoastal, or coastwise voyages is supported by two recent decisions in this circuit. In *Chevron U.S.A., Inc. v. Hammond,* 726 F.2d 483, we upheld an Alaska statute governing the discharge of ballast by oil tankers in Alaska's territorial waters where federal maritime law — the Port and Tanker Safety Act of 1978, 46 U.S.C. § 391 — also regulated coastal ballast discharge. We recognized in *Hammond* Alaska's strong interest in preventing oil pollution off its coast, noting that "[t]he subject matter of environmental regulation . . . has long been regarded by the [Supreme] Court as particularly suited to local regulation." *Id.* at 488. We concluded that state and federal regulation of the oil tankers were compatible, and that "there is no . . . dominant national interest in uniformity in the area of coastal environmental regulation." *Id.* at 492.[24] California has an equally strong interest in protect-

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[24]We did note in *Hammond* that the interest in uniformity in environmental regulation is greater where regulations cover activities on the high seas. 726 F.2d at 492 n.2. Our concern there, however, was clearly with regulation of *international* oil transport and *international* environmental protection efforts. *Id.* Here, as discussed above, the federal interest in uniformity is not as great, because the employees

ing maritime employees that reside in the state and work to protect California's coastal environment. *Hammond* thus lends support to Aubry's actions on the facts of the present case.

Also, in *Sewell v. M/V Point Barrow*, 566 F. Supp. 168, the Alaska District Court applied the state's wage laws to certain maritime employees working off the Alaska coast. The statute involved provided penalties, in the form of extra wage payments, to state workers not timely paid by maritime employers. *Id.* at 169-70. The district court held that, even though federal law did not provide such penalties for the employees in the case, enforcement of the Alaska statute was "fully compatible with federal maritime law," and no "feature of federal maritime law . . . would be impaired or frustrated by application of [the statute]." *Id.* at 170. *Sewell* thus supports the conclusion that California may constitutionally apply its more generous overtime laws to protect California-resident workers employed on the high seas off California's coast under the circumstances of this case.

The district court erred by holding that, under principles of federal admiralty law, the FLSA's savings clause cannot allow Aubry to apply California overtime laws that afford greater protection than the FLSA to California-resident maritime employees working primarily on the high seas off the California coast on vessels that do not engage in foreign, intercoastal, or coastwise voyages, whether or not the employees are exempted from the FLSA's overtime provisions.

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involved in this case are not engaged in foreign, intercoastal, or coastwise voyages.

CONCLUSION

Neither the Shipping Act nor the FLSA precludes Aubry's actions in this case, and, under the principles underlying *Jensen* and its progeny, applying California's overtime pay laws to these workers is not constitutionally invalid. Here, California's interest in protecting California-resident workers is great, the employees involved in the action work exclusively in waters off the California coast on vessels not engaged in foreign, intercoastal, or coastwise voyages, and Congress has shown no intent to preclude more generous state regulation of maritime workers. Aubry is not preempted from applying California's overtime provisions to the seamen and maritime employees involved in this suit.

The district court's judgment is REVERSED.

COPPLE, Senior District Judge, dissenting:

Judge Pregerson's majority decision explains in extensive detail the factual and procedural background of this appeal. Those facts will therefore only be highlighted. Twelve maritime employees filed complaints with the California Labor Commission seeking recovery of unpaid overtime wages due under the provisions of the California Industrial Welfare Commission Orders (8 Cal. Code of Regulations § 11345, *et seq.*). These maritime employees were hired by CLEAN SEAS, a company that owns and operates vessels which provide open ocean oil spill containment and recovery. The vessels are usually stationed over oil fields located in the Santa Barbara Channel approximately four to ten nautical miles off the California coast.

Some of the maritime employees are organized into crews that alternate work assignments in which they work seven days on the vessel followed by seven days rest on

shore. At the beginning and end of the seven day work assignments, the employees are transported via helicopter or vessel to and from the California coast.

In addition to those twelve employees, a deck engineer employed by TIDEWATER also filed a claim with the California Labor Commissioner for overtime against his employer. For that reason, TIDEWATER filed a complaint in intervention and was an intervenor on appeal. TIDEWATER provides offshore transportation in the Santa Barbara Channel between its pier or mooring buoy and oil rigs located between one and twelve miles offshore.

The Labor Commissioner of the State of California held a hearing pursuant to Cal. Lab. Code § 98 et seq. and made an award to each employee for unpaid overtime wages. In response to these awards, the employers along with various maritime associations filed a complaint for declaratory and injunctive relief in the District Court.

The District Court found that all of the employees in this action were engaged in activities on vessels which either stayed on the high seas surrounding the oil rigs or travelled between one port and the oil rigs located on the high seas. The District Court concluded that California could not apply its wage and hour provisions upon these employees who were primarily employed on the high seas because the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, preempted the application of such state laws to employees on the high seas. In so concluding, the District Court granted the employers' request for declaratory and injunctive brief, but limited the scope of the relief to, "(i) the FLSA-exempt seamen, whether working within the territorial zone or on the high seas, and (ii) maritime employees working primarily on vessels on the high seas that are not engaged in foreign or

intercoastal voyages." *Pacific Merchant Shipping Ass'n v. Aubry,* 709 F.Supp. 1516, 1526 (C.D. Cal. 1989). The District Court rejected a general federal admiralty law preemption argument, but held that the FLSA preempted California overtime pay laws with respect to the employees in this case.

A Court of Appeals may affirm a district court decision either on the same grounds, or on different grounds as those relied upon by the district court. *J.M. Martinac Shipbuilding v. Director, Office of Workers Compensation Programs,* 900 F.2d 180 (9th Cir. 1990). Therefore, it is appropriate to examine whether the District Court's decision is correct under either general federal admiralty law or under the FLSA.

I. Preemption Under Federal Admiralty Law

All sides agree that state laws which conflict with federal admiralty laws cannot be enforced by the state. *See, Southern Pacific Co. v. Jensen,* 244 U.S. 205, 217 (1917); *Daughtry v. Diamond M. Co.,* 693 F.Supp. 856, 861 (C.D.Cal. 1988). States may not apply their respective laws if the laws would "interfere with the proper harmony and uniformity" of existing admiralty law. *Southern Pacific Co.,* 244 U.S. at 216; *See also, Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920) (striking down an act of Congress which granted authority to the states to apply their workers compensation laws to maritime employees). However, state laws which do not conflict with federal admiralty law and which do not conflict with the essential characteristics of maritime uniformity may be incorporated into federal admiralty law and applied. 14 Wright & Miller, Federal Practice & Procedure: Jurisdiction 2d Section 3671, pp. 421-422; *Askew v. Ameri-*

can Waterways Operators, Inc., 411 U.S. 325, 341-42 (1973).

With respect to the present case, the district court reasoned that while a number of federal provisions do cover the overtime wages of seamen on a variety of voyages, no federal maritime law expressly addressed the overtime pay of the seamen and other maritime workers such as those involved in this case. The court then concluded that because the Maritime statutes did not purport to govern the overtime wages of employees such as those in this action, that maritime law did not preempt state overtime regulations. This is also the position taken by the employees and the United States.

This conclusion, however, does not consider all appropriate aspects of maritime law. The first aspect is that the employment relationship between the maritime employee and his employer is governed by maritime contract law. In *Union Fish Co. v. Erickson,* 248 U.S. 308 (1919) the Supreme Court held that California's statute of frauds was preempted by federal maritime law when raised in defense to a maritime contract claim. In reaching this decision, the Court stated that an employment contract between the master of a vessel and the vessel's owner is maritime in nature, and that any claim under the contract must be resolved pursuant to federal admiralty law.

The second aspect not considered is that absent an express contractual agreement to overtime pay, admiralty law has no requirement that a seaman receive such pay. *Sorensen v. City of New York,* 202 F.2d 857, 858-859 (2d Cir. 1953), *cert. denied,* 347 U.S. 951 (1954). The lack of an express overtime pay requirement for seamen under federal admiralty law does not necessarily mean that the federal government left the issue open to be decided by the states. To the contrary — cases reveal that courts,

regardless of state law, typically enforce employment contracts under admiralty law with respect to overtime pay. *See, e.g., The Youngstown,* 110 F.2d 968, 970 (5th Cir. 1940), *cert. denied,* 311 U.S. 690 (1940) (overtime performed and paid for in accordance with employment contract fully complies with the federal admiralty law); *C.M. Rousseau, Jr. v. Teledyne Movable Offshore, Inc.* 619 F. Supp 1513, 1518-1519 (D.La. 1985) (maritime employees held bound by employment agreement with respect to overtime claim).

As Justice Story stated in the historical case of *DeLovio v. Boit,* 2 Gall. 398, 7 F.Cas. 418 (C.C. Mass. 1815) (quoted in 14 C. Wright & A. Miller, Federal Practice & Procedure § 3675), admiralty jurisdiction of the federal courts "comprehends all maritime contracts. . .wheresoever they may be made or executed, or whatsoever may be the form of the stipulations." *Delovio,* 7 F.Cas. at 444. The employers point out that while the admiralty statutes do not specifically provide for overtime pay, admiralty law has developed through the federal courts to the point that the absence of overtime regulations means that maritime employers and employees may freely negotiate for the terms of the employment contracts apart from the strictures of state regulations.

This interpretation makes sense in light of the fact that the conditions under which maritime employees work, especially those working on the high seas, are substantially different from land-based employees. Land-based employees are able to return home every night after work whereas often in maritime situations employees are required to be transported to a work station on the high seas, remain at sea for days at a time and subsequently be transported back to land. This aspect of maritime life has

not changed for centuries and must have been understood at the inception of admiralty law.

> The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction."

The Lottawanna, 21 Wall. (88 U.S.) 558, 574, (1874). Justice Bradley went on to explain that in order to ascertain what the maritime law of this country is, if it is unclear from the laws and Constitution, "we must resort to the principles by which they have been governed." *Id.* at 576. Under this analysis, given that the maritime statutes do not provide for overtime compensation, one must resort to the principles by which maritime activities have been governed. Those principles are, as stated by the employers, that each maritime employee has been able to negotiate his own contract — to define and to include or not to include pay for overtime work. It is against this historical background that this case should be considered and it is through this historical background that one must conclude that state laws mandating overtime pay are preempted by federal admiralty law.

II. Preemption under the FLSA

The employers contend that state overtime regulations are not only preempted by federal admiralty law, but by the FLSA. The District Court found this argument "much more persuasive" than the preemption argument under federal admiralty law. 709 F.Supp. at 1524.

Section 207(a) of the FLSA provides overtime pay for employees who are engaged in "commerce or in the

production of goods of commerce." The district court concluded that because the employees are tied closely enough to commerce in that they are involved in the oil production industry, they are covered by this section of the FLSA. *Wirtz v. Intravaia,* 375 F.2d 62, 65 (9th Cir.), *cert. denied,* 389 U.S. 844 (1967); see also 29 U.S.C. Section 206(a)(4) (expressly applying minimum wage requirements to seamen).

The inclusion of seamen within the ambit of the FLSA is complicated by two other provisions of the Act. The first is 29 U.S.C. Section 213(b)(6) which exempts seamen from the FLSA's overtime compensation provisions. The District Court concluded that this specific exclusion of seamen from the overtime provisions further supported the argument that states were preempted from applying their overtime regulations to seamen such as the ones in this case. The district court stated:

> Congress has spoken directly on the issue of overtime pay for seamen. Therefore, California labor laws are preempted to the extent that they presume to regulate FLSA exempt seamen, both on the high seas and within the territorial zone. Further, given Congress' exemption of these seamen from even minimal federal overtime provisions, it would be at odds with the federal scheme to permit the states to enforce stricter overtime provisions via the FLSA's savings clause.

709 F.Supp. at 1525. This conclusion seems not only logical, but the only reasonable inference that could be drawn from Congress' explicit exemption of seamen from the overtime provisions of the FLSA.

The employees and the United States argue that this conclusion is unreasonable in light of the savings provision of the Act and cases which discuss that savings provisions. The provision states:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter.

29 U.S.C. Section 218(a). The employees and the United States claim that this provision clearly shows congressional intent to allow the states to set more generous overtime rates, even for seamen, than those established by the FLSA. While this argument seems on the surface to have some merit, it is weak in light of Congress' specific exemption of seamen from the overtime provisions already found in the FLSA. It is reasonable to conclude that seamen are exempt from mandatory overtime provisions and that Congress did not intend to leave the matter to the states to set overtime provisions for maritime employees on the high seas. As was concluded by the district court, "in light of the obvious conflict between California's overtime compensation provision and the FLSA, the FLSA preempts California's provision." 709 F.Supp. at 1525.

III. Conclusion

The decision of the District Court to grant the declaratory and injunctive relief should be AFFIRMED. The decision is properly based either upon preemption under general admiralty law or preemption under the FLSA.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC MERCHANT SHIPPING ASSOCIATION,
AMERICAN INSTITUTE OF MERCHANT SHIPPING,
OFFSHORE MARINE SERVICE ASSOCIATION,
WESTERN OIL & GAS ASSOCIATION AND CLEAN SEAS,
Plaintiffs-Appellees,

vs.

LLOYD W. AUBRY, JR., LABOR COMMISSIONER,
DIVISION OF LABOR STANDARDS ENFORCEMENT,
DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA,
Defendant-Appellant,

and

TIDEWATER MARINE SERVICE, INC.
AND WESTERN BOAT OPERATORS, INC.
Intervenors-Appellees.

No. 89-55379

ORDER

FILED MAY 28, 1991

Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: BROWNING and PREGERSON, Circuit Judges, and WILLIAM P. COPPLE, Senior District Judge

The panel as constituted above voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied, and the suggestions for rehearing en banc are rejected.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PACIFIC MERCHANT SHIPPING ASSOCIATION, etc., et al.,
Plaintiffs,
vs.
LLOYD W. AUBRY, JR., etc.,
Defendant,
TIDEWATER MARINE SERVICE, INC., et al.,
Intervenors.

NO. CV 88-0848-AWT

MEMORANDUM OPINION

FILED MARCH 1, 1989

I.

BACKGROUND

This case raises a novel issue of federal admiralty law: Whether California can apply its overtime pay provisions to seamen and to maritime employees employed on vessels situated primarily on the high seas.

Plaintiffs and intervenors seek declaratory and injunctive relief that California's labor laws are preempted by federal admiralty law and the United States Constitution insofar as they purport to regulate the wages, hours and working conditions of maritime employees whose work situs is a vessel normally situated on the high seas and seamen who work both on the high seas and within the territorial zone. Defendant is the California State Labor Commissioner (Labor Commissioner). He is in charge of the Division of Labor Standards Enforcement, Department of Industrial Relations, State of California (DLSE).

The matter is before the Court on the parties' cross-motions for summary judgment. Although there is some quibbling, essentially the parties agree upon the material facts and that only issues of law are involved.

A. *Terminology*

At issue in this case is whether "seaman" can take advantage of California's overtime compensation provisions. The term "seaman" is differently defined for different purposes. General maritime law defines "seamen" broadly to include individuals whose performance on board a vessel contributes to the functioning of the vessel, accomplishment of its mission or to the operation or welfare of the vessel. *See* 46 U.S.C. § 10101(3); Norris, *The Law of Seamen,* §§ 2.1, 2.3, 2.10 (4th ed. 1985); *Norman v. Aubrey Burke & Assoc.,* 585 F.Supp. 494 (E.D. La. 1984).

In contrast, the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.,* defines "seamen" much more narrowly for purposes of exemption from *federal* overtime provisions. 29 U.S.C. § 213(b)(6). Under the FLSA, a "seaman" is an individual who performs service "primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character." 29 C.F.R. § 783.31. For enforcement purposes, the federal Wage and Hour Administrator's position is that work of a different character is "substantial" if it occupies more than 20 percent of the time worked by an employee during any given workweek. *Id.* at § 783.37. However, the term "seaman" covers all types of crewmembers including, for example, sailors, engineers, radio operators, firemen, pursers, surgeons, cooks and stewards. *Id.* at § 783.32.

Those employees who are exempt under the FLSA will be referred to as "seamen." Those employees who fall within the general admiralty definition but not under the FLSA exemption, will be referred to as "maritime employees." However, it should be noted that all of these employees work in situations covered by admiralty law, *i.e.,* on vessels on navigable waters. *See* 14 Wright, Miller & Cooper, Federal Practice and Procedures: Jurisdiction 2d § 3671, p. 412 (cases cited therein); *In re Paradise Holdings, Inc.,* 619 F. Supp. 21, 22 (C.D. Cal. 1984),[1] *aff'd,* 795 F.2d 756 (9th Cir.), *cert. denied,* 107 S.Ct. 649 (1986).

For territorial purposes, "navigable waters" are divided into three zones. The zone inland from a nation's shores is referred to as the inland or internal waters zone. These waters (*e.g.,* bays and inlets) are subject to the complete sovereignty of the coastal nation. The second zone, measured seaward from the nation's coast, is comprised of a three-mile belt known as the marginal or territorial sea. A coastal nation may exercise extensive control over the territorial zone, but cannot deny the right of innocent passage to foreign nations. The third zone lies beyond the territorial sea and is referred to as the "high seas." This zone consists of international waters that are not subject to the dominion of any nation. *See United States v. Alaska,* 422 U.S. 184, 196-97 (1975).

Most of the rights and obligations of shipowners and seamen have been codified in 46 U.S.C. § 2101, *et. seq.* (the Shipping Act). The Act divides shipping routes into three categories — foreign, intercoastal and coastwise voyages. Foreign voyages consist of voyages between ports in different countries. 46 U.S.C. § 10301(a)(1). Intercoastal voyages consist of voyages between ports on the Atlantic and Pacific coasts. 46 U.S.C. § 10301(a)(2). Coastwise

voyages consist of voyages between ports in different states (except adjoining states). 46 U.S.C. § 10501(a). In addition, the United States Coast Guard defines coastwise vessels as those "normally navigating the waters of any ocean or the Gulf of Mexico 20 nautical miles or less off-shore." 46 C.F.R. § 70.10-13. *See, e.g., Sewell v. M/V Point Barrow,* 556 F.Supp. 168 (D. Alaska 1983) (seamen on vessels engaged in offshore test drilling operations on high seas employed on coastwise vessels).

The crewmembers whose claims precipitated this action were not on "voyages" that fall under any of these three categories. Their vessels either stayed on the high seas surrounding the oil rigs or "voyaged" between one port and the oil rigs. Therefore, a number of wage provisions in the Shipping Act do not apply to the affected crewmembers.

The vessels are, however, covered by a number of other Shipping Act provisions, as well as Coast Guard regulations. For example, some provisions limit the number of hours a crewmember can work to no more than 12 of 24 hours at sea and require a seagoing crew to be divided into at least two watches. 46 U.S.C. § 8104. In addition, all seamen and maritime employees are covered by a wide range of "protection and relief" statutes that govern, for example, health, taxes and attachment of wages. 46 U.S.C. §§ 11101-11112.

B. *The Parties*

Plaintiffs Pacific Merchant Shipping Association, American Institute of Merchant Shipping, Offshore Marine Service Association and Western Oil & Gas Association are maritime trade associations that collectively represent over one hundred maritime employers, including plaintiff Clean Seas and Intervenor Tidewater Marine,

Inc. The plaintiff trade associations often represent their members before local, state and federal legislative bodies, and initiate proceedings in state and federal courts to protect the interests of their members. Many of the plaintiff trade associations' members maintain business offices in California and provide maritime employment on American flag vessels to California residents, as well as to residents of other states. The maritime employers own and operate a variety of vessels registered pursuant to federal law. These vessels engage in foreign, intercoastal and coastwise voyages.

Most of the employees who are the subject of this action were or are employed by Clean Seas. Clean Seas is an unincorporated, cooperative association formed by several major oil companies. It contains and cleans up marine oil spills. It also performs other maritime activities to fulfill federal environmental protection requirements. In order to perform its duties, Clean Seas operates three American flag vessels under the names of *Mr. Clean, Mr. Clean II* and *Mr. Clean III. Mr. Clean* and *Mr. Clean II* are "bareboat charter" vessels. *Mr. Clean III* is owned by Clean Seas. *Mr. Clean II* is a 138 foot marine vessel moored in Port San Luis Harbor, California, about one-quarter mile from the shore. It remains moored approximately 90% of the time. The owners of *Mr. Clean II* contracted with Clean Seas to provide the vessel and its operating crew, and to operate the vessel pursuant to Clean Seas needs. Most of *Mr. Clean II's* duties involve control and cleanup of oil spills and related environmental discharge work in the Santa Barbara Channel.

Mr. Clean III is a 181 foot, 292 gross ton ocean-going vessel permanently stationed on the high seas over the Pedernales and Arguello oil fields on the Outer Continental Shelf.[2] These oil fields are located four to ten nautical

miles off the California coast and contain four oil drilling and production platforms. Each of these platforms is located six to seven nautical miles off the California coast. Except when on active duty, *Mr. Clean III* remains tied to a buoy anchored to the seabed approximately seven nautical miles off the California coast. Since June, 1986, *Mr. Clean III* has been on station, except during two months of extended repairs, and during occasional visits to port for minor repairs, resupply or the annual Coast Guard inspections. Crewmembers assigned to *Mr. Clean III* travel by helicopter from the Santa Barbara Airport to the vessel at the beginning of their service and return via helicopter at the end.

Intervenors Tidewater Marine Service and Western Boat Operators (collectively Tidewater) provide offshore transportation and support services throughout the world and have provided crew and supply boat services to offshore oil drilling platforms off the California coast since 1964. In the Santa Barbara Channel, Tidewater provides transportation services to a number of oil drilling platforms ranging in distance from one to twelve nautical miles off the coast. When a vessel is called, it goes to a pier to pick up cargo or passengers, travels to its destination (usually an offshore platform) and then returns to the pier or its mooring buoy.

The Labor Commissioner's duties include administering and enforcing compliance with many of California's labor laws, including the state's wage and hour laws. Don C. Craib (Craib), is the Senior Deputy Labor Commissioner in DLSE's Santa Barbara office. In all matters pertinent to this action, Craib is authorized to act on behalf of the Labor Commissioner.

At the base of this legal dispute lie the employees: the three crewmembers of *Mr. Clean II*[3] and nine

crewmembers assigned to Mr. Clean III.[4] All twelve appear to be California residents in that they have California addresses. Two of the crewmembers were licensed mates and ten were certified as "seamen" by the Coast Guard; the ten worked primarily on the "clean-up"operations. Nine of those ten had written employment agreements. In February 1988, Tidewater employee Frank Kleman (Kleman), also filed a complaint for overtime compensation with the DLSE. Tidewater had employed Kleman as a "deckhand" on a crewboat from July 1, 1981, through February 2, 1986, when he took a medical leave of absence.[5]

C. *The Factual Setting*

Although the Labor Commissioner continues to quibble over the definition of "seamen," all of the employees are either seamen or maritime employees. The parties agree that the wage claims of these crewmembers are governed by admiralty law. The issue in this case is whether California wage and hour laws should be applied as part of federal admiralty law in adjudicating the wage claims of maritime employees who work on the high seas and of seamen who work both on the high seas and within the territorial zone. *See East River S.S. Corp. v. Transamerica Delaval, Inc.,* 476 U.S. 858, 864 (1985).

The Cal. Lab. Code empowers the Labor Commissioner and his agents to (i) investigate employee complaints concerning wages, (ii) conduct administrative hearings for the purpose of resolving wage claims, (iii) issue orders, decisions and awards, (iv) assess liability and impose monetary sanctions and penalties, and (v) prosecute actions in court to enforce California's wage and hour laws. Cal. Lab. Code § 98. Cal. Lab. Code § 1173 grants the Industrial Welfare Commission (IWC)

authority to regulate the wages, hours and working conditions of those employees employed in the State of California. IWC Wage Order 4-80 covers "professional, technical, clerical, mechanical, and similar occupations." Cal. Adm. Code § 11345(2)(c). Based on his interpretation of his statutory authority, the Labor Commissioner applied Wage Order 4-80 to the crewmembers and awarded sizable overtime compensation.

The Labor Commissioner based his decision covering the crewmembers of *Mr. Clean II* on the fact that *Mr. Clean II* is moored in California's territorial waters and that a substantial part of the vessel's operation occurs within those waters. Therefore, he determined that crewmembers on *Mr. Clean II* fell under the jurisdiction of California's laws and regulations governing employer and employee relationships, and that neither the FLSA nor other maritime statutes preempt California's laws.

Prior to the hearing of *Mr. Clean III* crewmembers' individual claims, plaintiffs separately challenged the Labor Commissioner's jurisdiction; that challenge was rejected. Because of that prior ruling, the decision covering *Mr. Clean III's* crewmembers does not discuss any jurisdictional issues; specifically, it makes no distinction between vessels moored one-quarter mile from shore and those moored seven miles from shore. The Labor Commissioner did determine that whether or not the wage claimants were FLSA-exempt seamen does not preclude California's authority to regulate seamen independent of any federal jurisdiction.

The Labor Commissioner has stayed all similar DLSE proceedings pending the outcome of this action, including Kleman's claims. However, in his answers to interrogatories and in Craib's deposition testimony, the Labor Commissioner discussed (hypothetically) his views of the

Labor Commissioner's jurisdiction. In his deposition, Craib stated that DLSE would have jurisdiction over claims of employees on a boat stationed outside California's territorial boundaries, even if the employees were not California residents. (Ex.109 at 124-28.) ("I'm saying that we may properly exercise jurisdiction over and adjudicate the wage claim of a non-California resident whose primary work situs is outside the territorial bounds of California . . . My attorney said we have jurisdiction.")

Similarly, in his response to plaintiff's interrogatories, the Labor Commissioner claimed the right to assert jurisdiction over both non-California residents and California residents employed as seamen on a United States vessel that is permanently stationed outside the territorial boundaries of California. (Ex. 112 at 188-89.) This jurisdictional assertion was based on the fact that "[s]eaman is an inhabitant of California; and the vessel is not engaged in foreign and/or intercoastal voyages. California is exercising its police powers for the general welfare of its inhabitants."

D. *Plaintiffs' Claims*

Although plaintiffs purport to state three separate claims for relief, all three claims raise similar arguments and, in fact, are but one and the same claim. In substance, plaintiffs claim that California labor laws conflict with federal admiralty law, place a burden on maritime commerce and represent an impermissible arrogation of power on the part of a state to extend its territorial boundaries and exercise its sovereignty over the high seas. Intervenors' claims are similar.

Plaintiffs and intervenors seek a declaratory judgment that all California wage, hours and working condition laws are inapplicable to maritime employees whose work

situs is a vessel on the high seas and to all seamen, regardless of their work situs. In addition, both seek permanently to enjoin the Labor Commissioner from enforcing these state laws against them or their members.

II.

DISCUSSION

Before reaching the substance of this legal dispute, it is necessary to address two preliminary issues raised by the parties.

A. *Jurisdiction*

The Labor Commission contends that the action should be dismissed for lack of subject matter jurisdiction. He argues that by bringing this as a declaratory judgment action, plaintiffs have not changed their preemption assertion from its essential nature as a defense. *See e.g.*, *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 685 F.2d 1088, 1090 (9th Cir. 1982) (employer's anticipation of a federal defense of preemption by Title VII of employee's state discrimination claim insufficient to provide basis for federal question jurisdiction.)

The present case, however, involves a request for coercive injunctive relief, in addition to declaratory relief. In such a situation, the Supreme Court has recognized that federal question jurisdiction is appropriate:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal

> question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve. This Court, of course, frequently has resolved pre-emption disputes in a similar jurisdictional posture.

Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n. 14 (1983) (citations omitted). *Accord, Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 20 n.20 (1983) ("A person subject to a scheme of federal regulation may sue in federal court to enjoin application to him of conflicting state regulations and a declaratory judgment action by the same person does not necessarily run afoul of the *Skelly Oil* doctrine.").

In *Southern Pacific Transp. Co. v. Public Util. Comm'n*, 716 F.2d 1285, 1288 (9th Cir. 1983), the Ninth Circuit, applying *Shaw*, held that *Miller-Wohl* applies when *only* declaratory relief is sought. When, as here, plaintiffs also seek an injunction, federal question jurisdiction is proper. *Id.*[6]

B. *Scope of Declaratory Relief*

In their Complaint, plaintiffs request that this court adjudge "the legal rights and obligations of maritime employers with respect to their employment of seamen and/or other maritime workers on vessels normally situated on the high seas. . . ." In addition, Tidewater seeks a ruling covering all of its seamen, regardless of their work situs. The Labor Commissioner contends that plaintiffs and intervenors seek a declaratory judgment not on matters in controversy, but rather the adjudication of a future hypothetical controversy.

The Supreme Court has spoken often on the question of whether a situation presents an Article III case or controversy:

> The difference between an abstract question and a "case or controversy" is one of degree, of course, and is not discernible by any precise test. The basic inquiry is whether the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract."
>
> A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. But "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 297-98 (1979) (citations omitted). The parties do not dispute that a real controversy exists between the Labor Commissioner and the employers of the affected crewmembers. Instead, they dispute whether the remaining plaintiffs have demonstrated a realistic danger of sustaining a direct injury as a result of the Wage Order's enforcement.

According to the Labor Commissioner, plaintiff's request for relief is too broad because there is no evidence that the Labor Commissioner threatens to enforce California labor laws except with regards to the "affected employees" of Clean Seas and Tidewater. The Labor Commissioner claims that he will not exercise jurisdiction over non-inhabitants; however, this representation is directly contradicted by his answers to interrogatories and

Craib's deposition testimony. He is bound by the latter. *Radobenko v. Automated Equip. Corp.,* 520 F.2d 540, 544 (9th Cir. 1975) (party may not create issue of fact on a summary judgment motion by contradicting his own deposition). He also maintains that no evidence suggests that workers employed by other members of the plaintiff associations are affected by his overtime awards to Clean Seas' employees; thus, that any relief should be narrowly tailored.

Although this contention is not without merit, the argument goes too far. The rights of three other groups are directly at stake. The first group consists of the remaining crewmembers of *Mr. Clean III,* at least some of whom would be eligible to bring similar claims for overtime compensation. Further, *Mr. Clean III* still employs seven of the nine employees who were awarded overtime by the Labor Commissioner. Therefore, Clean Seas faces additional liability. Tidewater also faces similar, potential liability from its remaining crewmembers.

The second group is employers with a direct stake in the outcome of this litigation and include those members of the plaintiff associations who employ seamen or other maritime employees on vessels on the high seas, but which do not engage in foreign or intercoastal voyages. Plaintiffs maintain that their members operate vessels, similar to those used by Clean Seas, on the high seas, that are not engaged in foreign or intercoastal voyages. The third group affected by this litigation is those employers that have seamen, like Klemen, working within the territorial zone.[7]

Plaintiffs also challenge a broader group of statutory provisions than the Labor Commissioner has attempted so far to apply. The Labor Commissioner has applied California's overtime compensation provision, specifically

IWC Wage Order 4-80, to seamen and maritime employees. In applying this Wage Order, he has also invoked a number of statutory provisions covering other wage and hour requirements. *E.g.,* Cal. Lab. Code §§ 200 (definitions), 201 (time for payment upon discharge), 203 (penalty for failure to make payment at required time), 204 (requirement of semimonthly payment), 226 (itemized statement of wages). Clearly, the Court can determine whether application of those provisions was proper. However, plaintiffs request that the Court determine the applicability of "all other provisions of California wage and hour law." The Labor Commissioner contends that there is no evidence that he will seek to enforce any other provisions of the Wage Order other than the overtime provision. The Court agrees; consequently, it will limit its review to the overtime provisions only and to any other wage and hour provisions intertwined with the overtime compensation provision.

C. *Does Maritime Law Preempt State Law*

Both sides recognize the need for uniform regulation under admiralty law. Norris, *supra,* § 1.3, p. 4-5, *citing Panama R. Co. v. Johnson,* 264 U.S. 375 (1924). Therefore, state laws which conflict with maritime law cannot be enforced. *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 217 (1917); *Daughtry v. Diamond M Co.,* 693 F.Supp. 856, 861 (C.D. Cal. 1988). However, state laws that do not conflict may be incorporated into admiralty law and applied. 14 Wright & Miller, Federal Practice & Procedure: Jurisdiction 2d § 3671, pp. 421-422 (state law may not be applied to prejudice the characteristic features of maritime law or to disrupt the harmony it strives to bring to international and interstate relations); *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 341-42 (1973). Although a number of federal provisions do cover the overtime wages

of seamen on a variety of voyages, no federal maritime law *expressly* addresses the overtime pay of the seamen and other maritime workers such as those involved in the case at bench. Because of this absence of express federal provision, the Labor Commissioner contends that California labor laws do not conflict with federal law and are thus not preempted.

Plaintiffs' response is two-fold: First, although no federal maritime statute expressly addresses overtime compensation for the seamen and maritime employees involved in this action, the Shipping Act does govern other aspects of these employees' wages, hours and working conditions. Plaintiffs cannot, however, find safe harbor in this Act; defendant's exercise of jurisdiction conflicts directly with only one of its provisions. (When a seaman's wages must be paid. *Compare* 46 U.S.C. § 10313, *with* Cal. Lab. Code § 204.) In light of the general exemption of coastwise vessels *not* engaged on coastwise voyages from the comprehensive "burdensome requirements" of the Shipping Act, this one conflict does not seem sufficient to preempt California's overtime laws. *Inter-Island Nav. Co. v. Byrne,* 239 U.S. 459, 462-63 (1915).[8] Maritime statutes simply do not purport to govern the overtime wages of employees such as those in this action.

1. *FLSA v. State*

Plaintiffs next contend that, to the extent that seamen or maritime employees are not covered by federal maritime statutes, they are covered by the FLSA. This argument is much more persuasive.

Section 207(a) of the FLSA provides overtime pay for employees who are engaged in "commerce or in the production of goods for commerce." Although neither side cites any evidence that the maritime employees here fall

under the FLSA, it appears that the employees are tied closely enough to commerce (oil production) such that they are covered by the FLSA. *Wirtz v. Intravaia,* 375 F.2d 62, 65 (9th Cir.), *cert. denied,* 389 U.S. 844 (1967); *see also* 29 U.S.C. § 206(4) (expressly applying minimum wage to seamen); Friedell, *Benedict on Admiralty,* ¶ 104, pp. 7-6.

The FLSA constitutes a comprehensive, uniform and national system of wage and hour regulation. It provides maritime employers and employees with a uniform legal standard by which to ascertain their legal rights and obligations. It specifically exempts maritime workers, *i.e.,* seamen who are engaged primarily in the operation of a vessel. Further, the California overtime provisions and the FLSA provisions produce widely differing results. Plaintiffs contend that these conflicts establish that the FLSA preempts California labor provisions. In fact, the Labor Commissioner concedes that the FLSA would preempt state law, were it not for the FLSA's savings clause, 29 U.S.C. § 218(a).

2. *The FLSA Savings Clause*

The savings clause provides:

> "No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter. . . ."

29 U.S.C. § 218(a). According to the Labor Commissioner, this savings clause expressly permits California to apply its overtime provisions (which are admittedly more

generous) to those non-exempt maritime employees who qualify under the FLSA.

However, the FLSA's savings clause cannot properly be construed to save state laws that seek to regulate the employment of maritime employees whose work situs is a vessel normally situated on the high seas. This is so because Congress may not constitutionally delegate its maritime jurisdiction to the states. *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920); *see also Perez De La Cruz v. Crowley Towing & Transp. Co.,* 807 F.2d 1084, 1088 (1st Cir. 1986), *cert. denied,* 107 S. Ct. 2182 (1987) (Congress cannot delegate its maritime jurisdiction to the states, but can delegate it to Puerto Rico). Such a delegation would destroy the harmony and uniformity of admiralty law established by the Constitution. *Knickerbocker,* 253 U.S. at 164. Thus, under compulsion of the Constitution, the savings clause must be interpreted as not applying to maritime employees employed primarily on the high seas.

Although this argument lacks direct precedential support, common sense suggests that the uniformity of federal admiralty law would be destroyed if the states were permitted to "add on" to the federal law enacted by Congress. The maritime employees (and their employers) involved in the present action fall in the interstices between express federal maritime statutes. Nonetheless, because they are maritime employees and therefore subject to admiralty jurisdiction, they must be subject to uniform federal law. Therefore, California cannot apply its laws under the savings clause to destroy the nationwide uniformity of admiralty law.

This limiting construction of the FLSA's savings clause is similar to and consistent with the Supreme Court's limiting construction of the savings clause in the National Labor Relations Act (NLRA), 29 U.S.C. § 164(b). In *Oil,*

Chem. & Atomic Workers, Int'l Union, AFL-CIO v. Mobil Oil Corp., 426 U.S. 407 (1976), the Court adopted a "predominant job situs" test to determine when the NLRA's savings clause permits application of state "right-to-work" laws. Because the employees in *Mobil Oil* mostly worked on the high seas (outside the territorial bounds of the State of Texas), the Court held that Texas' right-to-work laws could not be applied to govern the agency-shop provision at issue. "It is therefore fully consistent with national labor policy to conclude, if the predominant job situs is outside the boundary of any State, that no State has a sufficient interest in the employment relationship and that no State's right-to-work laws can apply." *Id.* at 420-21.

Mobil Oil strongly suggests that the FLSA's savings clause should be limited so that California cannot apply its overtime provisions to employees whose predominant job situs is on the high seas, outside the territorial bounds of California. *See also Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223-229 (1986) (Death on the High Seas Act precludes application of state's wrongful death statute to accidents on the high seas *despite* savings clause preserving state statutory rights and remedies. "[W]e must infer that if Representative Mann and his colleagues intended affirmatively to require enforcement of state substantive law on the high seas, they would have taken care to make that requirement explicit.").

3. *FLSA Exempt Seamen*

Under the FLSA, seamen are exempt from federal overtime provisions. 29 U.S.C. § 213(b)(6). Federal law clearly preempts state law within the territorial zone if that state law conflicts with federal law. *See, e.g., Chevron U.S.A. Inc. v. Hammond*, 1980 A.M.C. 2416 (D. Alaska

1979). Congress has spoken directly on the issue of overtime pay for seamen. Therefore, California labor laws are preempted to the extent that they presume to regulate FLSA exempt seamen, both on the high seas and within the territorial zone. Further, given Congress' exemption of these seamen from even minimal federal overtime provisions, it would be at odds with the federal scheme to permit the states to enforce stricter overtime provisions via the FLSA's savings clause.

D. *Supremacy Clause Preemption*

Plaintiffs next contend that California's wage and hours laws are preempted by the Supremacy Clause because California cannot extend its territorial boundaries and exercise sovereignty over the high seas. Basically, they argue that by asserting jurisdiction over employment on the high seas, defendant has "enlarged" its territorial boundaries into areas within exclusive federal sovereignty. The Labor Commissioner has not responded to this argument. It is, however, no more than a variation of the arguments discussed above, and so, needs no separate elaboration.

E. *Interstate Commerce*

Plaintiffs' final argument is that application of California's overtime provisions to vessels on the high seas places an unconstitutional burden on interstate and maritime commerce. This is but another variation on the theme discussed above. Plaintiffs contend that maritime employment on the high seas is so national in nature as to permit only one uniform system of regulation. Therefore, that any state law that intrudes on this area is preempted under the Supremacy Clause. While it does appear that California's "police power" interest is weak, in light of the need for uniform law governing employees on the high

seas, the Court need not reach this commerce clause argument.

III.

CONCLUSION

In light of the obvious conflict between California's overtime compensation provision and the FLSA, the FLSA preempts California's provisions. Therefore, California cannot apply its wage and hour provisions to seamen or to maritime employees employed primarily on the high seas. Plaintiffs' and intervenors' request for declaratory and injunctive relief is granted. However, the scope of the relief is limited to (i) the FLSA-exempt seamen, whether working within the territorial zone or on the high seas, and (ii) maritime employees working primarily on vessels on the high seas that are not engaged in foreign or intercoastal voyages.

DATED: March 1, 1989

/s/
A. WALLACE TASHIMA
United States District Judge

FOOTNOTES

[1] This is a case from the District of Hawaii which is mistakenly reported as a case from the Central District of California. *See* 795 F.2d at 757.

[2] The record contains no description of *Mr. Clean.*

[3] William Mason, Rich Schwin and Paul Susoeff.

[4] Kent Creighton, Kevin Darcy, Paul Feavel, Enrique Gutierrez, Charles Koch, Robert Jacobs, Jr., Ted Mueller, Peter Reyna and James Spencer.

[5] None of these crewmembers are represented individually in this action. All have made wage claims to the Labor Commissioner. In most of these cases, awards have been made and the employers' *de novo* review is pending in state superior court. *See* Cal. Lab. Code § 98.2. Through their attorneys, they have filed an *amici curiae* brief in support of the Labor Commissioner's position.

[6] Because the court has subject matter jurisdiction of this dispute under 28 U.S.C. § 1331, as one arising under the Constitution, it need not address the question of whether, nevertheless, it would have subject matter jurisdiction under 28 U.S.C. § 1333(1), as a case arising under its admiralty and maritime jurisdiction. *See U.S. Bulk Carriers, Inc. v. Arguelles,* 400 U.S. 351 (1971) (seaman's suit for wages is within admiralty jurisdiction); *Putnam v. Lower,* 236 F.2d 561, 570 (9th Cir. 1956) ("jurisdiction of courts of admiralty over the wage claims of seamen is anciently established").

[7] Because Tidewater contends that all of its employees are seamen, with respect to the territorial zone, this decision affects only seamen and does not determine the

rights of maritime employees working within that zone. That decision must await another day.

[8] *See, also* M/V Point Barrow, 556 F.Supp. at 170 (Alaska statute assessing employers' penalty of up to ninety days of wages for failure to comply with proper demand for payment compatible with federal maritime law governing seamen's wage claims; deletion of penalty from federal law "reflected congressional recognition that it would be impractical to apply the elaborate scheme of the Shipping Commissioners Act to all vessels engaged in coastwise trade").

WAGES, HOURS AND WORKING CONDITIONS ADMINISTRATIVE CODE SECTION 11040

Article 4. Professional, Technical, Clerical, Mechanical, and Similar Occupations (Order No. 4-80, Effective January 1, 1980)

§ 11040. Order Regulating Wages, Hours, and Working Conditions in Professional, Technical, Clerical, Mechanical, and Similar Occupations

1. *Applicability of Order.* This Order shall apply to all persons employed in professional, technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis, unless such occupation is performed in an industry covered by an industry order of this Commission, except that:

(A) Provisions of Sections 3 through 12 shall not apply to persons employed in administrative, executive, or professional capacities. No person shall be considered to be employed in an administrative, executive, or professional capacity unless one of the following conditions prevails:

(1) The employee is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $900.00 per month; or

(2) The employee is licensed or certified by the State of California and is engaged in the practice of one of the following recognized professions: law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, or accounting.

(B) The provisions of this Order shall not apply to employees directly employed by the State or any county, incorporated city or town or other municipal corporation, or to outside salespersons.

(C) Provisions of this Order shall not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

2. *Definitions.*

(A) "Commission" means the Industrial Welfare Commission of the State of California.

(B) "Division" means the Division of Labor Standards Enforcement of the State of California.

(C) "Professional, Technical, Clerical, Mechanical, and Similar Occupations" includes professional, semiprofessional, managerial, supervisorial, laboratory, research, technical, clerical, office work, and mechanical occupations. Said occupations shall include, but not be limited to the following: accountants, agents, appraisers, artists; attendants; audio-visual technicians; bookkeepers, bundlers; billposters; canvassers; carriers; cashiers; checkers; clerks; collectors; communications and sound technicians; compilers; copy holders; copy readers; copy writers; computer programmers and operators; demonstrators and display representatives; dispatchers; distributors; door-keepers; drafters; elevator operators; estimators; editors; graphic arts technicians; guards; guides; hosts; inspectors; installers; instructors; interviewers; investigators; librarians; laboratory workers; machine operators; mechanics; mailers; messengers; medical and dental technicians and technologists; models; nurses; packagers; photographers; porters and cleaners; process servers; printers; proof readers; salespersons and sales agents; secretaries; sign erectors; sign painters; social

workers; solicitors; statisticians; stenographers; teachers; telephone, radio-telephone, telegraph and call-out operators; tellers; ticket agents; tracers; typists; vehicle operators; x-ray technicians; their assistants and other related occupations listed as professional, semiprofessional, technical, clerical, mechanical, and kindred occupations.

(D) "Emergency" means an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action.

(E) "Employ" means to engage, suffer, or permit to work.

(F) "Employee" means any person employed by an employer.

(G) "Employer" means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.

(H) "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

(I) "Minor" means, for the purpose of this Order, any person under the age of eighteen (18) years.

(J) "Outside Salesperson" means any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.

(K) "Primarily" as used in Section 1, Applicability, means more than one-half the employee's work time.

(L) "Split shift" means a work schedule which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

(M) "Teaching" means, for the purpose of Section 1 of this Order, the profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing or teaching in an accredited college or university.

(N) "Wages" (See California Labor Code, Section 290)

(O) "Workday" means any consecutive 24 hours beginning at the same time each calendar day.

(P) "Workweek" means any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods.

3. *Hours and Days of Work.*

(A) The following overtime provisions are applicable to employees eighteen (18) years of age or over and to employees sixteen (16) or seventeen (17) years of age who are not required by law to attend school: such employees shall not be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1½) times such employee's regular rate of pay for all hours worked over forty (40) hours in the workweek. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(1) One and one-half (1½) times the employee's regular rate of pay for all hours worked in excess of

eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) day of work; and

(2) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) day of work in any workweek.

(B) No employer shall be deemed to have violated the provisions of the above subsection (A) by instituting, pursuant to a written agreement voluntarily executed by the employer and at least two-thirds (⅔) of the affected employees before the performance of the work, a regularly scheduled week of work which includes not more than four (4) working days of not more than ten (10) hours each so long as the employee receives at least two (2) consecutive days off within each workweek, provided that:

(1) The employer is not required to pay the premium wage rate prescribed in subsection (A) for the 9th and 10th hours worked during such workdays;

(2) If an employee on such a four-day schedule is required or permitted to work more than ten (10) hours in any workday, the premium wage rate provisions in subsection (A) above shall apply to such employee for those hours worked in excess of the 10th hour of that work day;

(3) Any employee on such a schedule who is required or permitted to work on more than four (4) workdays shall be compensated at the rate of not less than one and one-half (1½) times the employee's regular rate of pay for the first eight (8) hours on such additional workdays and double the employee's

regular rate of pay for work in excess of eight (8) hours on those workdays.

(4) After a lapse of twelve (12) months and upon petition of a majority of the affected employees a new vote shall be held and a two-thirds (⅔) vote of the affected employees will be required to reverse the agreement above. If such agreement is revoked the employer shall comply within sixty (60) days. Upon a proper showing by the employer of undue hardship, the Division may grant an extension of the time for compliance.

(C) Provisions of subsections (A) and (B) above shall not apply to any employee whose earnings exceed one and one-half (1½) times the minimum wage if more than half (½) of that employee's compensation represents commissions.

(D) One and one-half (1½) times a minor's regular rate of pay shall be paid for all work over forty (40) hours in any workweek except that minors sixteen (16) and seventeen (17) years old who are not required by law to attend school and may therefore be employed for the same hours as an adult are subject to subsections (A) or (B) above.

(VIOLATIONS OF CHILD LABOR LAWS are subject to civil penalties of from $100 to $5,000 as well as to criminal penalties provided herein. Refer to California Labor Code Sections 1285 to 1311 and 1390 to 1398 for additional restrictions on the employment of minors.)

(E) An employee may be employed on seven (7) workdays in one workweek with no overtime pay required when the total hours of employment during such workweek do not exceed thirty (30) and the total hours of

employment in any one workday thereof do not exceed six (6).

(F) If a meal period occurs on a shift beginning or ending at or between the hours of 10 p.m. and 6 a.m., facilities shall be available for securing hot food or drink or for heating food or drink; and a suitable sheltered place shall be provided in which to consume such food or drink.

(G) Except as provided in subsections (D), (F) and (I), this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage.

(H) The provisions of this section are not applicable to (1) employees whose hours of service are regulated by the United States Department of Transportation Code of Federal Regulations, Title 49, sections 395.1 to 395.13, Hours of Service of Drivers, or (2) Title 13 of the California Administrative Code, Subchapter 6.5, section 1200 and following sections, regulating hours of drivers.

(I) No employee shall be terminated or otherwise disciplined for refusing to work more than 72 hours in any workweek, except in an emergency as defined in Section 2(D).

4. *Minimum Wages.*

(A) Every employer shall pay to each employee wages not less than four dollars and twenty-five cents ($4.25) per hour for all hours worked, effective July 1, 1988, except:

(1) LEARNERS. Employees 18 years of age or over, during their first one hundred and sixty (160) hours of employment in occupations in which they have no previous similar or related experience, may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel.

(2) MINORS may be paid not less than eighty-five (85%) of the minimum wage rounded to the nearest nickel, provided that the number of minors employed at said lesser rate shall not exceed twenty-five percent (25%) of the persons regularly employed in the establishment. An employer of less than ten (10) persons may employ three (3) minors at said lesser rate. The twenty-five (25%) limitation on the employment of minors shall not apply during school vacations.

Note: Under certain conditions, the full minimum wage may be required for minors. See Labor Code Section 1391.2(b).

(3) TIPPED EMPLOYEES may be paid not less than $3.50 per hour. A tipped employee is an employee who is engaged in an occupation in which he or she customarily receives gratuities, as that term is defined in Labor Code Section 350(e), of not less than sixty dollar ($60.00) per month.

(B) Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the

payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.

(C) When an employee works a split shift, one hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment.

(D) The provisions of this section shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

5. *Reporting Time Pay.*

(A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

(B) If an employee is required to report for work a second time in any one workday and is furnished less than two hours of work on the second reporting, said employee shall be paid for two hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

(C) The foregoing reporting time pay provisions are not applicable when: (1) Operations cannot commence or continue due to threats to employees or property; or when recommended by civil authorities; or

(2) Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system; or

(3) The interruption of work is caused by an Act of God or other cause not within the employer's control.

(D) This section shall not apply to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time.

6. *Licenses for Handicapped Workers.* A license may be issued by the Division authorizing employment of a person whose earning capacity is impaired by physical disability or mental deficiency at less than the minimum wage. Such licenses shall be granted only upon joint application of employer and employee and employee's representative if any.

A special license may be issued to a nonprofit organization such as a sheltered workshop or rehabilitation facility fixing special minimum rates to enable the employment of such persons without requiring individual licenses of such employees.

All such licenses and special licenses shall be renewed on a yearly basis or more frequently at the discretion of the Division.

(See California Labor Code, Sections 1191 and 1191.5.)

7. *Records.*

(A) Every employer shall keep accurate information with respect to each employee including the following:

(1) Full name, home address, occupation and social security number.

(2) Birthdate, if under 18 years, and designation as a minor.

(3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations

cease and authorized rest periods need not be recorded.

(4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.

(5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.

(6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

(B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.

(C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

(D) Clocks shall be provided in all major work areas or within reasonable distance thereto insofar as practicable.

8. *Cash Shortage and Breakage.* No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willfull act, or by the gross negligence of the employee. Notwithstanding the foregoing provision, where an employee has the exclusive and personal control of cash funds of the employer and is required by the employer to account, under reasonable accounting procedures, for said funds, the employer may upon prior written notice require reimbursement from such employee for cash shortages.

9. *Uniforms and Equipment.*

(A) When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term "uniform" includes wearing apparel and accessories of distinctive design or color.

Note: This section shall not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board.

(B) When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage may be required to provide and maintain hand tools and equipment customarily required by the trade or craft. This subsection (B) shall not apply to apprentices regu-

larly indentured under the State Division of Apprenticeship Standards.

Note: This section shall not apply to protective equipment and set devices on tools regulated by the Occupational Safety and Health Standards Board.

(C) A reasonable deposit may be required as security for the return of the items furnished by the employer under provisions of subsections (A) and (B) of this section upon issuance of a receipt to the employee for such deposit. Such deposits shall be made pursuant to Section 400 and following of the Labor Code, or an employer with the prior written authorization of the employee may deduct from the employee's last check the cost of an item furnished pursuant to (A) and (B) above in the event said item is not returned. No deduction shall be made at any time for normal wear and tear. All items furnished by the employer shall be returned by the employee upon completion of the job.

10. *Meals and Lodging.*

(A) "Meal" means an adequate, well-balanced serving of a variety of wholesome, nutritious foods.

"Lodging" means living accommodations available to the employee for full-time occupancy which are adequate, decent, and sanitary according to usual and customary standards. Employees shall not be required to share a bed.

(B) Meals or lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and employee. When credit for meals or lodging is used to meet part of the employer's minimum wage obligation, the amounts so credited may not be more than the following:

	Effective July 1, 1988
Room occupied alone	$ 20.00 per week
Room shared	$ 16.50 per week
Apartment — two thirds (⅔) of the ordinary rental value, and in no event more than	$240.00 per month
Where a couple are both employed by the employer, two-thirds (⅔) of the ordinary rental value, and in no event more than	$355.00 per month
Meals:	
Breakfast	$1.50
Lunch	$2.10
Dinner	$2.80

(C) Meals evaluated as part of the minimum wage must be bona fide meals consistent with the employee's work shift. Deductions shall not be made for meals not received nor lodging not used.

(D) If, as a condition of employment, the employee must live at the place of employment or occupy quarters owned or under the control of the employer, then the employer may not charge rent in excess of the values listed herein.

11. *Meal Periods.*

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period

of not less than thirty (30) minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of employer and employee. Unless the employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to.

(B) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

12. *Rest Periods.* Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.

However, a rest period need not be authorized for employees whose total daily work is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

13. *Change Rooms and Resting Facilities.*

(A) Employers shall provide suitable lockers, closets, or equivalent for the safekeeping of employees' outer clothing during working hours, and when required, for their work clothing during non-working hours. When the occupation requires a change of clothing, change rooms or equivalent space shall be provided in order that employees may change their clothing in reasonable privacy and

comfort. These rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean and sanitary.

Note: This section shall not apply to change rooms and storage facilities regulated by the Occupational Safety and Health Standards Board.

(B) Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.

14. *Seats.*

(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

(B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

15. *Temperature.*

(A) The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and the work performed.

(B) If excessive heat or humidity is created by the work process, the employer shall take all feasible means to reduce such excessive heat or humidity to a degree providing reasonable comfort. Where the nature of the employment requires a temperature of less than 60° F., a heated room shall be provided to which employees may retire for warmth and such room shall be maintained at not less than 68°.

(C) A temperature of not less than 68° shall be maintained in the toilet rooms, resting rooms, and change rooms during hours of use.

(D) Federal and State energy guidelines shall prevail over any conflicting provision of this section.

16. *Elevators.* Adequate elevators, escalator or similar service consistent with industry-wide standards for the nature of the process and the work performed shall be provided when employees are employed four floors or more above or below ground level.

17. *Exemptions.* If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in Section 7, Records; Section 11, Meal Periods; Section 12, Rest Periods; Section 13, Change Rooms and Resting Facilities; Section 14, Seats; Section 15, Temperature; or Section 16, Elevators, would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable notice is given in writing. Application for exemption shall be made by the employer or by the employee and/or the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment of the time the application is filed with the Division.

18. *Filing Reports.* (See California Labor Code, Section 1174(a))

19. *Inspection.* (See California Labor Code, Section 1174)

20. *Penalties.* (See California Labor Code, Section 1199)

21. *Separability.* If the application of any provision of this Order, or any section, subsection, subdivision, sentence, clause, phrase, word, or portion of this Order should be held invalid or unconstitutional or unauthorized or prohibited by statute, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect as if the part so held invalid or unconstitutional had not been included herein.

22. *Posting of Order.* Every employer shall keep a copy of this Order posted in an area frequented by employees where it may be easily read during the work day. Where the location of work or other conditions make this impractical, every employer shall keep a copy of this Order and make it available to every employee upon request.

DECLARATION OF CAPTAIN ROBERT A. JANECEK, USCG (RET.)

Captain Robert A. Janecek declares:

1. I am a retired Captain of the United States Coast Guard, and I currently work as an independent marine consultant, surveyor and safety inspector. I served in the Coast Guard more than 30 years, during which I had broad experience in all facets of the Coast Guard's work. I retired from the Coast Guard on June 30, 1988, with an Honorable Discharge. I was recalled to active duty during this past summer to supervise the Coast Guard's involvement in the America's Cup, completing that assignment at the end of September 1988.

2. My work in the Coast Guard generally included vessel inspections; port and environmental safety and management; marine casualty and personal injury investigations; enforcement of Coast Guard regulations; vessel operations; and drafting maritime policies, procedures and regulations.

3. During my final active duty assignment in the Coast Guard, I served from June 1986 through June 1988 as the Officer in Charge of the Los Angeles/Long Beach Zone. That Zone extends from Dana Point in the south to Point Conception in the north, including the Santa Barbara Channel. As Officer in Charge, I managed over 250 employees involved in diversified operations, including all Coast Guard vessel inspections in our Zone.

4. As part of all United States vessel inspections, the Coast Guard issues a document entitled "Certificate of Inspection," which lists certain information about the vessel and the conditions under which it may be operated. When I was Officer in Charge of the Los Angeles/Long Beach Zone, all Certificates of Inspection were issued

under my direction and approval. Although some Certificates of Inspection may bear the name of a Coast Guard officer other than myself, I had overall responsibility for their issuance and another name appears only because I was absent on the date in question.

5. The Certificates of Inspection issued under my direction and approval included certificates for the supply and crew boats used in servicing the offshore platforms in the Santa Barbara Channel. This included the supply and crew boats operated in the Santa Barbara Channel by Tidewater Marine Service, Inc., and Western Boat Operators, Inc. (collectively "Tidewater").

6. By way of example, the Coast Guard Certificate of Inspection issued for the Tidewater vessel *Smith Tide* was issued under my direction and approval. The Certificate of Inspection for *Smith Tide* is attached to this declaration as Exhibit A. The Certificate of Inspection for the Tidewater vessel *Manny Tide* (which I understand has previously been introduced as an exhibit in this case) was issued a short time before I became Officer in Charge of the Los Angeles/Long Beach Zone but under the same standards applied to *Smith Tide.*

7. In issuing Certificates of Inspection for vessels such as *Manny Tide* and *Smith Tide,* the Coast Guard examines a variety of factors that are specified by the federal maritime laws and regulations of the United States. These include the vessel manning requirements, total passengers, geographic area of operation, specified conditions of operation, and necessary safety equipment. In examining these factors, the Coast Guard is concerned about the safety and welfare of the vessel, its crew and its passengers, based upon standard government regulations and the unique specifications and working conditions of the vessel in question.

8. By way of example, the Certificates of Inspection for *Manny Tide* and *Smith Tide* both reveal crew boats that are 65 feet in length and 75 gross tons. The certificates specify the number of operators and crew required for the vessel under its various operating conditions, including ocean and coastwise routes. Although they concern basically the same kind of vessel, one can see slight differences in these Certificates of Inspection, reflecting the unique configuration of each vessel.

9. I understand that one of the parties in Tidewater's lawsuit against the California Labor Commissioner has argued that the Coast Guard and other federal maritime authorities exercise no jurisdiction over the working conditions and hours of work on offshore crew and supply vessels such as those operated by Tidewater in the Santa Barbara Channel. That assertion is absolutely incorrect.

10. In the first place, the whole idea of vessel inspections and Certificates of Inspection by the Coast Guard is to specify the overall safe operating conditions of each vessel. That necessarily includes the welfare and working conditions of the crew, as a vessel cannot be operated safely if the crew is overworked or overextended. That is why Coast Guard Certificates of Inspection specify the manning requirements for each vessel under its various operating conditions.

11. In addition, there are federal maritime laws that specifically govern working hours and conditions of work on these kinds of vessels. For example, Title 46, Section 8104 of the United States Code specifies:

> "(b) On an oceangoing or coastwise vessel of not more than 100 gross tons (except a fishing, fish processing, or fish tender vessel), a licensed individual may not be required to work more than 9 of

> 24 hours when in port, including the date of arrival, or more than 12 of 24 hours at sea, except in an emergency when life or property are endangered."
>
> "(g) On a towing vessel (except a vessel to which subsection (c) of this section applies), an offshore supply vessel, or a barge to which this section applies, that is engaged in a voyage of less than 600 miles, the licensed individuals and crewmembers (except the coal passers, firemen, oilers, and water tenders), may be divided, when at sea, into at least 2 watches."

Even more detailed specifications of vessel manning requirements and hours of work can be found in regulations adopted by the Coast Guard and reported in Title 46 of the Code of Federal Regulations.

12. These specifications are reflected in the Certificates of Inspection for Tidewater vessels such as *Manny Tide* and *Smith Tide*. Those certificates therefore provide that the vessel's normal crew of 2 operators and 2 deckhands may be reduced to 1 operator and 1 deckhand "when the vessel is away from a shoreside dock or safe mooring buoy *for not more than 12 hours in any 24 hour period*." (Emphasis added.) This specification of hours is consistent with the Coast Guard's interpretation of the requirements of Section 8104 of Title 46, quoted above, that no individual may be required to work more than 12 of 24 hours at sea for vessels of this kind.

13. Historically these vessels operate on a 24 hour a day basis with a normal workday for seamen (including officers) being up to but not exceeding 12 hours per day while the vessel is at sea. The actual hours worked (up to 12 hours) is quite flexible and depends upon the operations the vessel is engaged in. In all of the years I have

been involved in supervising the manning requirements for crew boats and supply boats of the type operated by Tidewater, I have always considered and understood the 12 hour shift to be the normal workday for seamen (including officers) serving on these type vessels.

I declare under penalty of perjury under the laws of the United States of America including the laws of the State of California that the foregoing is true and correct and that this declaration was executed at Invergordon, Scotland, on November 11, 1988.

/s/
Capt. Robert A. Janecek
USCG (Ret.)